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In the Supreme Court of the United States

OCTOBER TERM, 1986

ROGER E. THOMAS, FRANKLIN K. COOK, JR., DONALD J. GIARRATANO, JACK N. IVY, MIKEY R. SMITH, MARK A. THOMPSON, LARRY C. DEFIBAUGH, JOHN C. MCCALLUM, MARK A. HOLMES, JEFFERY W. SCHLOTE, AND KEVIN C. SHEPHERD; ALL SOLDIERS IN THE UNITED STATES ARMY,
PETITIONERS,

v.

THE UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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United States Army

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Captain, JAGC
United States Army

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QUESTIONS PRESENTED

1. WHETHER the doctrine of implied bias precluded a commanding general from convening courts-martial where the military appellate courts found the existence of unlawful command influence by that commander whose comments had the effect of abrogating the presumption of innocence and discouraging favorable defense witnesses from testifying at trial.

2. WHETHER accused soldiers, whose courts-martial were convened by a convening authority determined by appellate courts to have exerted unlawful command influence, were denied due process of law.

3. WHETHER Articles 22(b) and 23(b) of the Uniform Code of Military Justice were improperly interpreted by the lower court to require a showing of actual bias for the disqualification of a convening authority to the preclusion of the application of implied bias as a permissible standard to disqualify the convening authority.

4. WHETHER reversal of petitioners' convictions is the only remedy that would effectively enforce Congress' emphatic prohibition against improper command influence, restore public confidence in the fairness of military justice, and maintain military discipline and combat readiness.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. _____

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioners, Roger E. Thomas, Franklin K. Cook, Jr., Donald J. Giarratano, Jack N. Ivy, Mikey R. Smith, Mark A. Thompson, Larry C. Defibaugh, John C. McCallum, Mark A. Holmes, Jeffery W. Schlote, and Kevin C. Shepherd, respectfully pray that a writ of certiorari issue to review the judgments and opinions of the United States Court of Military Appeals entered in these proceedings.

OPINIONS BELOW

The joined opinion of the Court of Military Appeals in the cases of *United States v. Thomas, United States v. Cook, United States v. Giarratano,* is reported at 22 M.J. 388 (C.M.A. 1986) [hereinafter cited as *Thomas*] (Appendix A). In the cases of the remaining petitioners, the Court of Military Appeals summarily affirmed based on the *Thomas* decision.

JURISDICTION

The judgments of the Court of Military Appeals in *Thomas, Cook,* and *Giarrantano,* were entered on September 22, 1986. The judgments in the remaining cases were subsequently entered between September 23, 1986 and October 10, 1986 (*see* Appendices E-L). The jurisdiction of the Court is invoked under 28 U.S.C. § 1259(3) (Supp. II 1984).

CONSTITUTIONAL PROVISION INVOLVED

Amendment V, U.S. Constitution, provides:

> No person shall . . . be deprived of life, liberty, or property without due process of law.

STATUTORY PROVISIONS INVOLVED

Article 22, Uniform Code of Military Justice [hereinafter cited as UCMJ], 10 U.S.C. § 822 (1982) provides:

> (a) General courts-martial may be convened by –
>
> . . .
>
> (3) the commanding officer of a Territorial Department, an Army Group, an Army, an Army Corps, a division, a separate brigade, or a corresponding unit of the Army or Marine Corps;
>
> . . .
>
> (b) If any such commanding officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority if considered desirable by him.

Article 23, UCMJ, 10 U.S.C. § 823 (1982) provides:

> (a) Special courts-martial may be convened by –
>
> (1) any person who may convene a general court-martial;
>
> . . .
>
> (b) If any such officer is an accuser, the court shall be convened by superior competent authority, and may in any case be convened by such authority if considered advisable by him.

Article 37, UCMJ, 10 U.S.C. § 837 (1982) provides:

> (a) No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceedings. No person subject to this chapter may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or any other military tribunal or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.

STATEMENT OF THE CASES

Major General (MG) Anderson was the convening authority who referred all of petitioners' cases to trial. The individual case histories of Petitioners Thomas, Cook, Giarratano, Ivy, Smith, Thompson, Defibaugh, McCallum, Holmes, Schlote, and Shepherd, are set forth in Appendices B-L, respectively.

The questions presented in this petition have been fully litigated at every stage of the appellate process in all cases. The issue addressed by the United States Court of Military Appeals, as a prerequisite to the Court's jurisdiction, was as follows:

> WERE THE REMEDIAL ACTIONS TAKEN BY THE COURT OF MILITARY REVIEW APPROPRIATE AND ADEQUATE, UNDER THE CIRCUMSTANCES OF EACH CASE, TO ELIMINATE THE PREJUDICIAL IMPACT OF UNLAWFUL COMMAND INFLUENCE FOUND TO HAVE BEEN EXERCISED WITHIN THE THIRD ARMORED DIVISION, OR DID GENERAL ANDERSON'S COMMENTS HAVE SUCH A DELETERIOUS EFFECT ON THE JUDICIAL PROCESS THAT EVEN MORE DRASTIC ACTION, SUCH AS AUTOMATIC REVERSAL OF THE FINDINGS AND SENTENCE, IS REQUIRED?

STATEMENT OF THE FACTS

The extensive litigation, in some 230 cases, on the issue of improper command influence within the Third Armored Division (headquartered in Frankfurt, Federal Republic of Germany) before the lower military courts have resulted in one crucial and immensely important finding, *to wit*: there was *in fact* an exercise of unlawful command influence within the Third Armored Division by MG Anderson while he was in command from February 19, 1982 until March 1, 1984. As the commander, MG Anderson was the convening authority for all general courts-martial and special courts-martial em-

powered to adjudge a punitive discharge.[1] Major General Anderson had an intense interest and zealous concern with military justice. He was critical and frustrated with the operation of the military justice system within the Third Armored Division.[2] It is the manifestations of his frustrations and zealousness that established the factual predicate for the finding of improper command influence.

Between April and December 1982, MG Anderson lectured at approximately ten meetings with his subordinate commanders and senior noncommissioned officers.[3] At these meetings MG Anderson spoke on the subject of testifying on behalf of accused soldiers at courts-martial, *i.e.*, to instruct his subordinates on how they should perform their military justice duties. There was a recurrent theme at these lectures. He stressed that it was "inconsistent" for commanders to testify as character witnesses on behalf of an accused soldier and to opine that such soldier should be retained in the service *after* the same commanders had recommended the accused to be tried by a court-martial empowered to adjudge a punitive discharge.

More than fifty witnesses testified at trial in *United States v. Giarratano*, 20 M.J. 553 (A.C.M.R. 1985), *aff'd*, 22 M.J. 388 (C.M.A. 1986), as to their recollections of MG Anderson's message at the various meetings they attended.[4] Most of

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[1] *See* Articles 22 and 23, UCMJ, 10 U.S.C. §§ 822 and 823 (1982).

[2] United States v. Treakle, 18 M.J. 646, 662 (A.C.M.R. 1984) (*en banc*) (Cohen, J., concurring), *remanded*, ___ M.J. ___ (C.M.A. 1986).

[3] "These lectures were given at meetings held at different levels of command and at various locations throughout his division, and the audience varied. Sometimes, only commanders were in attendance, and at other times only senior noncommissioned officers. At still other times there was a mix between officers and noncommissioned officers." *Treakle*, 18 M.J. at 663 (Yawn, J. concurring in part and dissenting in part).

[4] The record of trial in *Giarratano* was extensively used in the Third Armored Division litigation. At the trial level military judges "judicially noted" its findings in subsequent cases. At the appellate level it was admitted as an appellate exhibit in petitioners' cases. Because it is the most complete inquiry into the nature and scope of command influence in the Third Armored Division, all references to a record and appellate exhibits will be to the *Giarratano* record.

these witnesses agreed that MG Anderson was displeased over favorable testimony on behalf of an accused soldier by commissioned and noncommissioned officers after a case had been referred to trial. The overwhelming recollection was that MG Anderson espoused, in no uncertain terms, a "don't testify" policy.[5] Some understood MG Anderson's remarks

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[5] *See* affidavits and testimony of : First Sergeant (1SG) Robert L. Carr, R. 79, 86, 96 ("I felt that it was . . . General Anderson's feelings, that he did not want us testifying for an accused soldier" R. 96); Captain (CPT) John F. Day, R. 124-25 ("What I understood . . . one would not refer somebody for a court-martial and then also act, for instance, as a favorable witness for the defense in either the actual trial or extenuation and mitigation."); Sergeant First Class Warren T. Forkin, Appellate Exhibit XCIV ("[MG Anderson] definitely indicated to us that as NCO's we would support his command and that we would not go up and testify on behalf of a soldier the chain of command had put up for a court-martial."); CPT James R. Fricke, R. 578-79, 596 ("[MG Anderson] could not believe that a commander would press charges and then go back and testify for the accused . . . . As he got into that topic, you could see his anger; or you could feel [h]is anger, as his voice was increasing . . . ."); CPT Richard P. Gebhardt, R. 651, 653 ("When [MG Anderson] came in the meeting he was upset, visibly upset . . . he made a statement that he was tired of officers and noncommissioned officers preferring charges against soldiers . . . and then giving testimony as to their good character . . . . I was a little bit astonished. I couldn't quite believe that a 2-star general would be saying something like. . . . Well, to me – he didn't actually ask me to lie, but he was asking me, I believe, to suppress the truth . . . . But . . . there wasn't any other way to interpret it."); Command Sergeant Major (CSM) George C. Hogan, R. 439, 474 ("[D]o not testify on behalf of a soldier in your same chain of command, particularly if your commander has preferred charges" R. 439.); CSM Robert E. Jones, R. 699, 700-01 ("[MG Anderson] indicated to us that noncommissioned officers should not testify or be a witness for a soldier that's being court-martialed and say things about the soldier . . . . I perceived it that, if you did speak to someone about that, you would probably get in trouble somewhere . . . . The division would probably come down on you."); CPT Steven E. Miller, Appellate Exhibit LXXXV ("He also indicated something to the effect that good soldiers don't get into trouble and how could someone testify for a bad soldier . . . . The bottom line understanding from these comments was that a chain-of-command does not testify at Extentuation and Mitigation when the chain-of-command preferred charges . . . . [A] chain-of-command, if they testify, owes its responsibility to the Army and not the individual soldiers . . . . I took his comments to be directed at me as policy, and that he was trying to directly influence me on whether I'd go to trial on behalf of one of my soldiers."); 1SG Robert T. McCrimmon, R. 410, Appellate Ex-

as a warning that if they dared to contravene this policy, repercussions would follow (R. 304-305, 318). The impression made upon MG Anderson's audience was further enhanced by his displays of anger at the meetings (R. 305, 399, 409-410, 440, 577, 579, 651, 713, 716, 776, 783, 811). On one occasion, he expressed his feeling over testimony that he considered ill-advised as testimony that "really pisses me off" (R. 783, 898-899, 1214).

Specific incidents evidence that MG Anderson was driven by an adamant personal desire to "purify" the Army of undesirable soldiers (R. 352-353). At one meeting, MG Anderson stated that noncommissioned officers "had a moral obligation to the service to weed out the undesirable, and put them out of the service" (R. 509). He did much more than espouse a "purification" policy. The following incidents exemplify the extent to which MG Anderson ensured that his policy was carried out.

In one case, after a noncommissioned officer, Sergeant Wright, was charged with driving under the influence of alcohol and leaving the scene of an accident, MG Anderson made an unannounced visit to the sergeant's unit. Confronting the unit first sergeant, MG Anderson demanded: "Let's talk about this fucker you got called Sergeant Wright" (R. 1078). Apparently very upset over the incident, MG Anderson refused to listen to any explanation (R. 1079-80).

In another case, a soldier's name appeared on the military police blotter.[6] The soldier's command sergeant major who answered the unit telephone was confronted by an angry MG

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hibit XXIII, p.83 (MG Anderson stated "[t]hat he couldn't understand how senior enlisted and officers could go in and testify for a person who was charged, I think, with rape or drugs, and that it was unprofessional to do that" R. 410); 1SG Obie L. Spratling, R. 1165 ("[MG Anderson] said it was your duty as a professional soldier to not go to court and say this guy is a good soldier when you know he's convicted of several crimes."); CPT Andrew Shattuck, Appellate Exhibit XCV ("His [MG Anderson's] tone of voice and speech made it obvious that favorable testimony on behalf of a convicted soldier really made him angry.").

[6] A military police desk blotter is a daily chronological record of police activity, developed from reports, complaints, information and incidents, that is distributed to commanders throughout the division. *See* Dep't of Army,

Anderson who fired a series of suggestive and rhetorical questions indicating that the soldier should have been reduced in rank (R. 446). When the battalion commander returned MG Anderson's call to explain the mitigating circumstances in the soldier's case, he was unable to get MG Anderson to listen and the conversation was reduced to a "yes, sir, no sir, type thing, and that was it" (R. 450).

A third incident demonstrates the direct coercion with which MG Anderson's policy was enforced. The military police battalion commander of several units located primarily within MG Anderson's jurisdiction had testified on behalf of two accused soldiers. After the court-martial of one of the soldiers, in March 1982, the battalion commander was contacted by MG Anderson's legal advisor who said "MG Anderson was upset that [the soldier] had been retained and had not been immediately reclassified" (Affidavit of LTC Mueller, Defense Appellate Exhibit L, p.2) At the court-martial of the second soldier, the battalion commander recommended that the soldier be retained in the service and the court-martial subsequently did not adjudge a punitive discharge. The battalion commander received another call from MG Anderson's legal advisor informing him that MG Anderson had read the record and was upset with his testimony (*id.*). It was the conclusion of that battalion commander that it was the policy within the Third Armored Division that once commanders recommended a special or general court-martial then the accused soldier was guilty *and* should be punitively discharged (*id.*).

The inculcation of MG Anderson's policy was not limited to his own lectures and actions of his legal advisor. His message was further disseminated throughout the Third Armored Division by the division command sergeant major, who had the responsibility of articulating established command policies and standards, by way of a policy letter (NCOPP letter #16, dated January 25, 1983). In this letter, noncommissioned officers were told *not* to "[s]tand before a court-martial jury . . . and state that even though the accused raped a woman or sold drugs, he is still a good soldier on duty" (*id.*).

Reg. No. 190-45, *Military Police-Records and Forms*, Appendix A, p.4 (15 July 1981).

The command sergeant major expressed the same message to his subordinates at a number of seminars (R. 233, 249-250, 306, 524-525, 1238, 1298). His letter and lectures were widely perceived as a reiteration of MG Anderson's message (R. 93, 95-96, 306, 580, 701, 708, 1168, 1178; Appellate Exhibit LXXXV).

A second command sergeant major transmitted a disposition form wherein noncommissioned officers were reminded of their ethical duty to *refrain* from testifying on behalf of a "convicted" soldier (Appellate Exhibit IV). He further stated that "[i]f you personally cannot subscribe to this philosophy my friend, you need to leave the Army and find another occupation in life" (*id.*). This admonishment was perceived to be consistent with MG Anderson's views (R. 444, 470-471).

The military judge, in *Giarratano*, determined that MG Anderson's comments induced members of the Third Armored Division to believe:

> [T]hat the chain of command who prefers a case presumably believes the accused guilty; and two, that the extenuation and mitigation testimony made by an accused's chain of command is (A) not meaningful; (B) not credible; (C) should be ignored; and (D) once charged and convicted of a drug or sex offense, or other serious crime, the accused should be discharged. *Taken together these comments could reasonably cause an accused to be convicted quicker and the eventual sentence imposed to be greater.*

(R. 1440) (emphasis added). This same judge characterized the situation in the Third Armored Division as an "egregious case of command influence" (R. 1445). Subsequently, the Army Court of Military Review also found that there existed unlawful command influence in the Third Armored Division, and ultimately concluded that MG Anderson's remarks influenced court members not only to disregard favorable character testimony presented on behalf of a convicted soldier, but also to discount any evidence inconsistent with

the predetermination of an accused soldier's guilt made by the convening authority and those commanders who recommended referral of the charges for trial.[7]

Attempts were made to retract MG Anderson's statements. In March and September 1983, MG Anderson disseminated two letters stating that a soldier had a duty to testify (Appellate Exhibit XIII, pages 4 and 10). These "retraction" efforts were found to be ineffective remedial action by the military judge in *Giarratano* (R. 1444-45).

The military courts took some remedial actions to cure the effects of the unlawful command influence exerted by MG Anderson. However, they held that the referral process was unaffected by the command influence.

REASONS FOR GRANTING THE WRIT

Introduction

The problem of improper command influence is not new to the Court. In various opinions the Court has recognized the everpresent danger of command influence in the military justice system. *See, e.g., O'Callahan v. Parker*, 395 U.S. 258, 263-266 (1969); *Burns v. Wilson*, 346 U.S. 137, 141 (1953). Never, however, has the Court, nor the federal circuit courts,[8] been confronted with as extreme a case of improper

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[7] In the first case decided by the Army court on the unlawful command influence issue, United States v. Treakle, 18 M.J. 646 (A.C.M.R. 1984) (*en banc*), the court initially determined that MG Anderson's remarks merely discouraged favorable *character* testimony and did not affect other testimony favorable to the accused. *Id.* at 652-653, 658. Upon consideration of additional evidence presented to the court after the *Treakle* opinion, the Army court found that the scope of unlawful command influence affected *all* favorable testimony on behalf of the accused, both on the merits and during sentencing proceedings. *See* United States v. Mitchell, 19 M.J. 905, 907 (A.C.M.R. 1985).

[8] *See, e.g.*, Baker v. Schlesinger, 523 F.2d 1031 (6th Cir. 1975), *cert. denied*, 424 U.S. 972 (1976) (insufficient evidence to support defense allegation that court members were improperly influenced by instructions from commanding officers and by reprimands which had allegedly been given to other court-martial panels which had acquitted other accused soldiers); Calley v. Callaway, 519 F.2d 184, 213-216 (5th Cir. 1975), *cert. denied*,

command control as that which existed in the Third Armored Division. Affecting some 230 cases, its magnitude is unprecedented. It was pervasive, enduring for over a year and a half. Its insidious nature was an affront to basic constitutional tenets.

Major General Anderson's actions made a mockery of the military justice system and denied due process of law to each petitioner. He blatantly defied Congress' emphatic prohibition against unlawful command influence which was the primary purpose in enacting the UCMJ. His actions eroded public confidence in the administration of military justice in the armed services. Although the command influence in the instant cases was intended to "purify" the nation's fighting force, it had the ultimate effect of diminishing morale and the soldiers' confidence in the judgment of their commander. In effect, the command influence within the Third Armored Division imperiled the combat readiness of a division located on the forward edge of this country's defense forces along the Iron Curtain.

Petitioners come before the Court seeking the only appropriate remedy under the circumstances, reversal of their convictions and sentences. The instant petition presents the Court with the opportunity to exercise its supervisory power and establish a standard of review for a problem that continually plagues the military courts.

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425 U.S. 911 (1976) (no merit to petitioner's accusations that command influence was involved in bringing charges against him); Homcy v. Resor, 455 F.2d 1345, 1352-1357 (D.C. Cir. 1971) (members of petitioner's court-martial held to have been constrained by improper command pressure from exercising their honest judgment in determining an appropriate sentence). *Cf.* Engels v. United States, 678 F.2d 173 (Ct. Cl. 1982) (two officer effectiveness reports on plaintiff, who was an Air Force captain, were defective in that the raters' evaluations were deliberately lowered by improper command influence which contributed substantially to two passovers for promotion to rank of major and required relief by reinstatement to active duty).

I. THE COURT BELOW ERRED BY HOLDING THAT MAJOR GENERAL ANDERSON WAS NOT DISQUALIFIED FROM ACTING AS CONVENING AUTHORITY WHERE IMPLIED BIAS SHOULD HAVE BEEN APPLIED TO DISQUALIFY HIM FOR LACKING THE REQUISITE IMPARTIALITY NECESSARY TO REFER CASES TO COURTS-MARTIAL.

A. The Convening Authority's Referral Power Is Judicial In Nature.

At the outset, petitioners emphasize that they do not challenge the structure of the military justice system which grants to the convening authority multiple roles[9] in the court-martial process.[10] Although the Court has been reluctant to interfere with the military system where military authority was challenged,[11] the instant cases involve important constitutional due process rights that are not balanced against but rather enhance military discipline.

It is axiomatic that an effective military justice system requires impartiality from those who sit in judgment of accused soldiers. The instant petition deals solely with the ability of the particular commanding officer who convened petitioners' courts-martial to execute his referral power in a manner con-

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[9] In addition to determining whether the charges against an accused should be referred to a court-martial, the convening authority also selects the court-martial members. Article 25(d)(2), UCMJ, 10 U.S.C. § 825(d)(2). Approval of the findings and sentence adjudged at a court-martial is within the perogative of the convening authority. Article 60(c), UCMJ, 10 U.S.C. § 860(c). The convening authority may change a finding of guilty of a charge or specification to a lesser included offense or set aside any finding of guilty. *Id.* The convening authority also may disapprove a legal sentence in whole or part, mitigate the sentence, or change a punishment to one of a different nature as long as the severity of the punishment is not increased. *Id.*

[10] Circuit courts have rejected the contention that the delegation of multiple roles to the convening authority is a *per se* violation of the due process clause of the fifth amendment. Curry v. Secretary of the Army, 595 F.2d 873 (D.C. Cir. 1979); Hendrix v. United States, 555 F.2d 785, 790 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 849 (1977); McDonald v. United States, 531 F.2d 490 (Ct. Cl. 1976) (*per curiam*).

[11] *See, e.g.*, Goldman v. Weinberger, ___ U.S. ___, 106 S.Ct. 1310 (1986) (deference given to determinations of the Air Force in regulating the apparel of its service members).

sistent with due process of law. A decision in petitioners' favor would not change the existing structure but merely establish a standard of review for the determination of whether a particular convening authority should be disqualified.

The referral decision of the convening authority is the military counterpart to indictment by grand jury in the federal sector. While the entire pretrial process is a combination of investigations and recommendations from subordinates,[12] it is clear that the convening authority's role is judicial in nature.[13] *United States v. Ellsey*, 16 U.S.C.M.A.

[12] There are multiple actors in the pretrial process other than the convening authority. The accuser is the one who brings or "prefers" charges against the accused and is generally the accused's immediate commander. The accused's immediate commander, along with the battalion commander and the brigade commander, make a recommendation as to the level of court-martial at which the accused should be tried. If a general court-martial is recommended, then an investigatory hearing is held pursuant to Article 32, UCMJ. The investigating officer who conducts the hearing then makes a report as to the sufficiency of the evidence to proceed to trial. This report is given to the officer, usually a brigade commander, who appointed the Article 32 investigating officer. The brigade commander can either refer the case as a special court-martial, or handle it at some lower level, or send it to the general court-martial convening authority with a recommendation for a general court-martial. If a general court-martial is recommended, then the report is submitted to the staff judge advocate who is the convening authority's legal advisor. The staff judge advocate, in turn, makes his recommendation as to the disposition of the charges. *See* Article 34, UCMJ. Then, the convening authority, with the evidence and the recommendations of his subordinates before him, makes the decision to (1) refer the case to trial at the level of court-martial recommended, (2) refer the case to a lower level of court-martial than recommended, (3) return the charges to a subordinate commander for his disposition, or (4) dismiss the charges. *See generally* Rules for Courts-Martial [hereinafter R.C.M.] 307, 401-407, 601, 604, *Manual for Courts-Martial, United States, 1984*.

[13] The decisions required of a convening authority include:

> [A] preliminary finding that there is sufficient evidence of the accused's guilt to justify trial . . . . The commander must also determine what level of court is justified and in doing so sets the maximum punishment. . . . In making this decision the commander must consider all extenuating and mitigating factors.

Hansen, *Judicial Functions for the Commander?*, 41 Mil.L.Rev. 1, 37 (1968). It is noted that the author is now a brigadier general serving as Assistant Judge Advocate General for Military Law.

455, 457, 37 C.M.R. 75, 77 (1966); *United States v. Nix*, 15 U.S.C.M.A. 578, 580, 36 C.M.R. 76, 78 (1965); *United States v. Bunting*, 4 U.S.C.M.A. 84, 87, 15 C.M.R. 84, 87 (1954); *United States v. Toon*, 48 C.M.R. 139, 143 n.1 (A.C.M.R. 1973) (*en banc*).[14]

The constitutional right to indictment assures the integrity of the truth-determining process and tends to prevent arbitrariness and repression. *Gosa v. Mayden*, 413 U.S. 665, 681 (1973). Since indictment is inapplicable to the military justice system, the referral process must serve the same purpose. Indeed, the convening authority, as does the grand jury, stands between the accuser and the accused.[15] As such, the convening authority must possess the same degree of impartiality demanded of any grand juror or judge.

B. Major General Anderson Was Disqualified As Convening Authority Based On Implied Bias.

The court below held that MG Anderson was not disqualified from convening courts-martial because "[d]espite [his] misguided zeal, his initial interest in the various prosecutions was official, rather than personal." *Thomas*, 22 M.J. at 394. This holding sidesteps the issue of MG Anderson's ability to exercise his referral power in a *judicious* manner. Petitioners do not dispute that MG Anderson's interest was "official" insofar as a commander's zeal to eliminate undesirable soldiers can be deemed official. The problem, though, is that MG Anderson's perspective was *solely* from that of a military commander to the detriment of his judicial role as convening authority.

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[14] *Cf.* United States v. Hardin, 7 M.J. 399, 404 (C.M.A. 1979) (suggests that referral is more aptly characterized as "quasi-judicial").

[15] "Historically, the [grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused, . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will." Wood v. Georgia, 370 U.S. 375, 390 (1962) (footnote omitted).

The fact that a commanding officer is cast in the dual roles of a commander responsible for the success of the military mission and of a convening authority who must safeguard the rights of the individual soldier is in itself a compromising situation. *See Curry v. Secretary of the Army*, 595 F.2d at 877 ("[T]he system established in the UCMJ would be inconsistent with due process if instituted in the context of a civilian criminal trial.") (footnote omitted). The role of the convening authority is at odds with his role as commander.[16] The convening authority must avoid even the appearance of unlawful influence for "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). In the instant cases, a commanding general clearly exceeded those acceptable bounds.

Unquestionably, MG Anderson was concerned with his role as a commander to the exclusion of his role as convening authority. This is evidenced by his goal to "purify" the Army. His repeated "inconsistency" message at various meetings before his subordinates improperly induced them to forego the presumption of innocence and to disregard favorable testimony on behalf of the accused. It is but a small step in logic that if MG Anderson induced others to ignore these two fundamental due process protections, then he himself believed the same. A convening authority who believed that the accused soldier was guilty once his name appeared on the police blotter or once charges were preferred was incapable of fairly assessing the sufficiency of the evidence. Similarly, a convening authority who believed favorable testimony on the part of the accused should be disregarded by the court members could not himself consider fairly the extenuating and mitigating factors when he made his referral decision. In short, MG Anderson lacked the degree of impartiality and judiciousness required to exercise his referral power.

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[16] *Cf.* United States v. Toon, 48 C.M.R. at 143 n.1 ("The thin line between command responsibility and judicial responsibility is difficult to draw. . . . 'we must differentiate between the virtues of command responsibility and the vices of command control.' ") (citation omitted).

Unlawful command influence within the Third Armored Division has been established by all levels of military courts. The pervasive dangers the Court feared in *O'Callahan*[17] and voiced by Congress,[18] has, in fact, materialized in the instant cases.

One man was ultimately responsible. And yet, even after efforts had begun to cure the harm he had done, MG Anderson continued to exercise his referral power to send soldiers to trial despite his apparent inability to exercise that power in the judicious manner required. The military appellate courts have ignored the reality of MG Anderson's perspective which was partial only to his role as commander. The evidence propels the conclusion that he could not act and think impartially and judiciously when he made his referral decisions.

The principle of "implied bias" posits that bias may be conclusively presumed as a matter of law. *United States v. Wood*, 299 U.S. 123, 133 (1936). Bias is imputed regardless of actual partiality. *Id.* at 134. The doctrine recognizes that bias will rarely be admitted by the juror himself, or the convening authority in these cases, either because the individual may have an interest in concealing his own bias or because he is unaware of it. *Smith v. Phillips*, 455 U.S. 209, 221-222 (1982) (O'Connor, J., concurring). The absence of a balanced perspective is a cognizable form of bias. *Id.* at 228 (Marshall, J., dissenting).

While the Court has not explicitly applied the concept of implied bias,[19] it has disqualified judges and jurors in criminal

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[17] "[T]he suggestion of the possibility of influence on the actions of the court-martial by the officer who convenes it, selects its members . . . and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to eliminate the danger." *O'Callahan*, 395 U.S. at 264.

[18] *Uniform Code of Military Justice: Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services* [hereinafter cited as *Hearings on H.R. 2498*], 81st Cong., 1st Sess. 644, 651, and 715 (1949).

[19] The Court has, however, left the door open for its application in the appropriate case. As Justice O'Connor stated,

> While each case must turn on its own facts, there are some extreme situations that would justify a finding of implied bias. Some examples

trials without requiring a showing of actual bias against the defendant.[20] *See, e.g., Ward v. Village of Monroeville*, 409 U.S. 57, 58-59 (1972) (denial of due process where traffic violator was tried before the mayor who was responsible for village finances and whose court, through fines, forfeitures, costs, and fees, provided a substantial portion of village funds); *Estes v. Texas*, 381 U.S. 532, 542-43 (1965) (requirement of showing actual prejudice in the jury box not necessary in extreme circumstances where there has been inherently prejudicial publicity such as to make the possibility of prejudice almost unavoidable); *Turner v. Louisiana*, 379 U.S. 466 (1965) (jury could not try a case after it had been placed in the protective custody of deputy sheriffs who were principal prosecution witnesses, even though the jurors may not have been influenced by the association); *Leonard v. United States*, 378 U.S. 544 (1964) (*per curiam*) (prospective jurors for defendant's second trial automatically disqualified after they heard the announcement of defendant's guilty verdict in the first trial on related charges); *Crawford v. United States*, 212 U.S. 183, 192-197 (1909) (clerk of city post office was disqualified as juror in a trial on charges of conspiracy against the government).

C. Articles 22(b) and 23(b), UCMJ, Which Disqualify A Convening Authority Who Is An "Accuser," Should Be Interpreted To Include Disqualifications Based On Implied Bias.

The Court of Military Appeals found that MG Anderson was not disqualified, under Articles 22(b) and 23(b), UCMJ, from convening general or special courts-martial because he

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> might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction.

Smith, 455 U.S. at 222 (O'Connor, J. concurring) (footnote omitted).

[20] Disqualification of a federal judge under 28 U.S.C. § 455 may be "by reason of an interest or the *appearance of possible bias*." United States v. Will, 449 U.S. 200, 216 (1980) (emphasis added).

was not an "accuser."[21] Petitioners contend, however, that these provisions should be broadly interpreted to provide for the disqualification of a convening authority based on implied bias. Only then can Congress' desire to stem the tide of command influence be best promoted. Even the Court of Military Appeals recognizes that these provisions complement the prohibition against command influence under Article 37, UCMJ. *See United States v. Ridley*, 22 M.J. 43, 45-46 (C.M.A. 1986) ("Consistent with the objectives of Congress in drafting the Code . . . this Court's precedents have established that the disqualification in Articles 22(b) and 23(b) should be applied broadly.").[22] But the court below did not go far enough in its application of these provisions to protect petitioners from an injudicious, uncontrolled convening authority.

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[21] To the extent that the court below correctly interpreted these provisions to disqualify a convening authority only upon a showing of actual prejudice, then these provisions are constitutionally inadequate to protect petitioners' rights. Indeed, the Court rejected the requirement to demonstrate specific prejudice in Ward v. Village of Monroeville, 409 U.S. at 61, for the disqualification of the judge. There, the Ohio statute permitted disqualification of the judge only when actual bias when shown. *Id.* The Court's response was "[i]f this means that an accused must show special prejudice in his particular case, the statute requires too much and protects too little." *Id.* Thus, petitioners need not show that MG Anderson was actually biased in each of their cases when he referred them to trial; it is sufficient to establish that the probability of prejudice exists. As the Court stated:

> [O]ur system of law has always endeavored to prevent even the probability of unfairness. . . . This Court has said . . . that "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Tumey v. Ohio*, 273 U.S. 510, 532 [(1927)]. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their best to weigh the scales of justice equally between contending parties.

In re Murchison, 349 U.S. 133, 136 (1955).

[22] *See also* United States v. Crossley, 10 M.J. 376, 379 (C.M.A. 1981) (Everett, C.J., concurring) (A narrow interpretation of the term "accuser" would "fan the criticism of the broad responsibilities Congress has assigned to military commanders.").

Military precedents have applied Articles 22(b) and 23(b), UCMJ, to disqualify a convening authority (1) when the circumstances are conducive to the actual or perceived exercise of command influence upon the convening authority[23] and (2) when the convening authority has a personal stake in the successful prosecution of the accused.[24] But the military courts have yet to disqualify a convening authority for injudicious conduct in the referral process. The application of the disqualification provisions to such a situation is absolutely necessary to curb command pressure and insure due process of law. Otherwise, military justice is at the mercy of commanders' whim.

Where a convening authority is disqualified under Article 22(b) or Article 23(b), UCMJ, and substantial rights of the accused were materially prejudiced, reversal is the proper remedy. *Cf. United States v. Corcoran*, 17 M.J. 137 (C.M.A. 1984); *United States v. Gordon*, 1 U.S.C.M.A. 255, 2 C.M.R. 161 (1952). Accordingly, MG Anderson's disqualification requires reversal in petitioners' cases because of the pervasive, egregious command influence he exerted.

II. MAJOR GENERAL ANDERSON'S DISQUALIFICATION AS CONVENING AUTHORITY REQUIRES REVERSAL OF PETITIONERS' CONVICTIONS AND SENTENCES.

A. Command Influence Presents A Threat To The Military Justice System Of A Constitutional Magnitude.

The military justice system is unique in that it subjects citizens to trial for life and liberty without certain very basic constitutional rights afforded to civilians, *i.e.*, the right to a jury trial, the right to bail, the right to grand jury indictment. U.S. Constitution, Amendments V and VI. *See also*

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[23] *See, e.g.*, United States v. Ridley, 22 M.J. 43 (C.M.A. 1986) (accuser outranked convening authority).

[24] *See, e.g.*, United States v. Corcoran, 17 M.J. 137 (C.M.A. 1984) (convening authority directed that the accused be charged with disobeying an order that the convening authority initially suggested); United States v. Gordon, 1 U.S.C.M.A. 255, 2 C.M.R. 161 (1952) (accused burglarized the convening authority's house).

O'Callahan, 395 U.S. at 273. The Court has recognized that court-martial jurisdiction is an aberration that exists only out of absolute military necessity as related to the primary function of the military, *to wit*: combat readiness. *Toth v. Quarrels*, 350 U.S. 11, 22 (1955). Aside from the lack of these fundamental constitutional safeguards, the nature of the military environment is inherently conducive to command influence.[25]

In response to the dangers lurking in military trials, Congress created Article 37, UCMJ, which prohibits the improper use of command influence.[26] Command influence in violation of Article 37, UCMJ, deprives an accused of his fifth amendment right to due process. *See Burns v. Wilson*, 346 U.S. at 141. The military justice system is vulnerable to illegal command influence because unlawful command influence is subtle and "may assume many forms [and] may be difficult to uncover. . . ." *United States v. Karlson*, 16 M.J. 469, 474 (C.M.A. 1983).

One of the detrimental consquences of improper command influence is its adverse effect on military discipline and combat readiness. The military commander who ordered petitioners' trials sought to rid the Army of undesirable soldiers in a fundamentally unfair and unlawful fashion.

> What a few commanders fail to realize . . . is that the scales always become loaded against justice when [unlawful command influence is exerted]. . . . The result is

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[25] *See O'Callahan*, 395 U.S. at 263-266; *Burns*, 346 U.S. at 141.

[26] Article 98, UCMJ, 10 U.S.C. § 898, in effect makes a violation of Article 37, a criminal offense. Before the enactment of Articles 37 and 98, interested citizens expressed a concern that unlawful command influence would be difficult to control:

> [N]o matter how many Articles 37 you write forbidding coercion of the courts – so long as there are commanding generals who feel it is their duty to influence the courts because discipline requires it, they are going to find means to do so.

Hearings on H.R. 2498, 81st Cong., 1st Sess. 652 (1949) (statement of Arthur E. Farmer, Chairman, Committee on Military Law of the War Veterans Bar Association).

> drumhead justice – a situation which may as adversely affect discipline and moral as the offense [committed].

United States v. Olson, 29 C.M.R. at 105. *See also United States v. Karlson*, 16 M.J. at 474 ("Congress has clearly recognized that unlawful command influence on the members of a court-martial has a pernicious effect not only on military justice but on discipline and morale as well.").

Military leaders have long recognized that soldiers will sacrifice, even their lives, for a commander they view as fair and worthy of following – and that soldiers only grudgingly follow a commander perceived as unfair and arbitrary.[27] The military best performs its mission when commanders administer military justice in a fair manner.

At the time of the enactment of the UCMJ, Congress recognized that the public had a continuing dissatisfaction with military justice.[28] The public tends "to perceive the

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[27] Similar sentiments were expressed in hearings before Congress when the UCMJ was enacted.

> Morale will never be so high as when the individual American soldier or sailor or airman is convinced that he is going to get a fully square deal if he is accused of a crime or offense and that he is going to be tried under a system of justice which is in accord with the traditional philosophy to which he had been accustomed. That is not going to interfere with his military efficiency. Far from doing that, it is going to increase his military efficiency.

Hearings on H.R. 2498, 81st Cong., 1st Sess. 630 (1949) (statement of Frederick P. Bryan, Chairman, Special Committee on Military Justice of the Bar Association.

[28] "[T]he general public . . . look with suspicion upon all things military and particularly on matters involving military justice." Mundy v. Weinberger, 554 F. Supp. 811, 820 n.28 (D.C. 1982) (citation omitted). The chairman of the committee which drafted the UCMJ has well explained the goal which, in light of public suspicion, the UCMJ was designed to achieve.

> We recognized that this is a combination of administration and discipline. In our opinion there is just no question that you cannot ignore the disciplinary aspect of the thing but we feel that by the system we have set up, we have made a fair compromise of the thing and we are also insistent that when you have an Army that is composed of citizens, . . . you have got to have morale at home as well as morale in the Army; and that, unless our citizens believe that a man when he is charged before a court-martial, is going to get the same kind of a

Army as an establishment in which obedience is coerced and disobedience or misconduct ruthlessly, swiftly, and arbitrarily punished, with no hope of appeal or escape from the supposed brutalities of the system." *Constitutional Rights of Military Personnel: Hearings on S. Res. 260 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary* [hereinafter cited as *Senate Hearings on S. Res. 260*], 87th Cong., 2d Sess. 63 (1962) (statement of Hon. Alfred B. Fit, Deputy Under-Secretary of the Army).

In enacting Article 37, UCMJ, Congress attempted to eradicate the public's perception that the purpose of a court-martial is to impose punishment on an individual without determining whether the individual actually committed the alleged misconduct and that court members in disposing of a case only acted out the desires of the commander who appointed them in the first place.[29]

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square trial that he would get in the United States district court if he were charged there, then it seems to me you are going to have this constant dissatisfaction, this constant agitation against the Army and Navy and Air Force for the way they treat their men when they are charged with offenses.

Hearings on S. 857 Before a Subcommittee of the Armed Services Committee of the United States Senate, 81st Cong., 1st Sess. 49 (1949) (statement of Mr. Morgan).

[29] The statement of then Representative Gerald R. Ford, Jr., is typical of those which were considered by the subcommittee on the proposed UCMJ:

> [My comments] are based upon my experience of some 46 months in the United States Navy during World War II. . . .
>
> It seems to me that a general statement can be made, with all honesty, that in the Navy, at least, *justice is sometimes forgotten in order to impose on people in the service punishment of some kind or other.*
>
> *I am particularly concerned about the fact that in courts-martial too often a court-martial board does not determine the guilt or innocence of the accused; but rather seeks to award punishment one way or another.*
>
> *I can recall hearing conversations between members of boards along this line. "What does the Old Man want us to do?"*
>
> Now, that only illustrates the fact that these court-martial boards are not attempting to decide one way or another – is the man guilty or innocent. They are only trying to find out what the captain of a ship, or the commanding officer of a station, wants done with the man.
>
> . . .

The actions of MG Anderson as commander of the Third Armored Division and the consequences thereof, indicate that the perceptions and concerns of the soldiers and the public are real. Major General Anderson failed to understand the dividing line between proper execution of command responsibility and illegal command influence. He perpetuated the evil that Congress intended to eliminate more than 35 years ago, thus, nullifying the effectiveness of Article 37, UCMJ.

B. Unlawful Command Influence By A Convening Authority Violates Due Process Of Law Just As Racial Discrimination Impacts On The Selection Of Grand Jurors.

The referral process in the military justice system is similar to the federal grand jury process. The determinations which the convening authority makes during the referral process are like the determinations made by the grand jury. *Compare* R.C.M. 601 *with* Fed. R. Crim. P. 6-8. For instance, both processes determine whether there is sufficient evidence to believe that an offense has been committed and that the accused committed it. The convening authority and the grand jury can charge a lesser or greater offense. Significantly, the convening authority and the grand jury can make a determination that the charges should not go forward even where a conviction can be obtained. Similar to the grand jury's power to charge a capital or noncapital offense, the convening authority decides in those cases where the death penalty is authorized whether the case should be referred capital or noncapital. Since the convening authority and the grand jury have a great deal of power in determining the disposition of charges against an individual,[30] both must maintain an appearance of fairness and integrity within their respective judicial systems and to the public.

> *I also participated in various courts-martial; and the whole system is fundamentally wrong;* and I am particularly pleased to see something being done about it. . . .
>
> I think that I reflect the attitude of many civilians who served in the armed forces during the last war.

Hearings on H.R. 2498, 81st Cong., 1st Sess. 825 (1949) (emphasis added).

[30] This is especially true in the military where any individual subject to the UCMJ can prefer charges but only the convening authority has the

Racial discrimination in the selection of grand jurors is similar to the evil that lurks in the military justice system from unlawful command influence. Racial discrimination, like unlawful command influence, is subtle, hard to pin-point, and difficult to assess. Both destroy the appearance of justice and undermine the integrity of the judicial process. Both impair the confidence of the public in the administration of justice. The harm that results from these two evils is not only to the accused, but to the system itself.[31]

In *Vasquez v. Hillery*, 474 U.S. ____, 106 S.Ct. 617 (1986), the Court reaffirmed its conviction that discrimination on the basis of race in the selection of grand jurors " 'strikes at the fundamental values of our judicial system and our society as a whole.' " 106 S.Ct. at 623, *quoting Rose v. Mitchell*, 443 U.S. at 556. The criminal defendant's right to equal protection of the laws has been denied when he is indicted by a grand jury from which members of a racial group have purposefully been excluded. *Id.* "[E]ven if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offenses, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and, consequently, the nature or very existence of the proceedings to come." *Id.*

> [A] conviction cannot be understood to cure the taint attributable to a charging body selected on the basis of race. Once having found discrimination in the selection of a grand jury, we simply cannot know that the need to indict would have been assessed in the same way by a grand jury properly constituted. *The overriding imperative to eliminate this systematic flaw in the charging process,* as well as the difficulty of assessing its effect on any given defendant, *requires our continued adherence to a rule of mandatory reversal.*

106 S.Ct. at 624 (emphasis added).

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power to refer the case to trial. Therefore, the convening authority is the only one who can prevent vindictive and otherwise improper prosecutions.

[31] *See* Rose v. Mitchell, 443 U.S. 545, 555-556 (1979) (racial discrimination in the selection of the grand jury required reversal of conviction).

When a constitutional error calls into question the objectivity of the one responsible for bringing an accused to judgment, a reviewing court cannot presume regularity or evaluate the resulting harm. *Vasquez*, 106 S.Ct. at 623. Unlawful command influence, like discrimination in the grand jury, undermines the structural integrity of the criminal tribunal itself. Both involve a wrong that should be corrected without regard to prejudice.

The confirmation of the convening authority's determinations by a conviction on the charges and a sentence that corresponds to the level of court-martial to which charges were referred, does not eliminate the fact that unlawful command influence impermissibly infected the referral process. The overriding imperative to eliminate unlawful command influence in the military justice system and the difficulty in assessing its effects on any given accused, requires mandatory reversal.

C. Harmless Error Review Should Not Apply When An Accused's Right To Due Process Is Denied By Unlawful Command Influence.

Generally, prejudice resulting from constitutional error that deprives an accused of a fair trial, must be shown to have been cured beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18 (1967). However, there are "rights so basic to a fair trial that their infraction can never be treated as harmless error." *Chapman*, 386 U.S. at 23.

The commander, as convening authority, is significantly involved in the military justice system. The role of convening authority is at odds with the role of commander. As a commander, he wants to command the best possible organization. He wants to weed out anyone who will stand in the way of this goal. He wants and demands the support of his subordinates in accomplishing this goal. As convening authority, he is concerned with justice, fairness, and maintaining the integrity of the military judicial system. His role as convening authority is to be neutral, detached, and unbiased. A delicate balance must be maintained by the individual who assumes these roles. Given that the role of commander is paradoxical

to the role of convening authority, it is even more compelling that the perception of fairness in the military justice system be maintained.

The actual existence of and the appearance of unlawful command influence in the instant cases is so aggravated and so ineradicable that no remedy short of reversal of findings and sentence will convince the public that each petitioner received due process of law.[32] Unlawful command influence is within the control of the government and has the appearance of being sanctioned by the government. Thus, it is within the power of the government to prevent. The remedy must look beyond the effect on the individual accused to its effect on the military justice system and maintaining the public's faith in that system. Consideration must be given to the appearance or perceptions of fairness in military judicial proceedings.

Article 37 has not been an effective self-enforcing provision:

> [T]hough this Court has sat for eleven years, and reviewed numerous records involving the issue, we have yet to see a single person brought to trial for violation of an accused's right to an impartial hearing. *Reversal, therefore, remains the only shield to which an accused may look for protection against arbitrary interference.*

United States v. Wood, 13 U.S.C.M.A. 217, 231, 32 C.M.R. 217, 231 (1962) (Ferguson, J., dissenting) (emphasis added).[33] Thus, the only effective remedy for a violation of

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[32] Applying a harmless error analysis to violations of an accused's procedural rights reduces the law to "pretend rules," and allows prosecutors to engage in prohibited conduct subject only to "purely ceremonial" words of appellate displeasure. United States v. Antonelli Fireworks Co., 155 F.2d 631, 661 (2d Cir. 1946) (Frank, J., dissenting), *cert. denied*, 329 U.S. 742 (1946).

[33] Military experience since the enactment of Articles 37 and 98, UCMJ, indicates that commanders have continued to attempt to eliminate servicemembers and otherwise impose unfair trial results in the name of discipline. *See, e.g.*, United States v. McClain, 22 M.J. 124 (C.M.A. 1986) (commanding general excluded lower rank enlisted soldiers as court members and replaced junior court members with more senior officers to obtain courts less disposed to lenient sentences); United States v. Brice,

Article 37, UCMJ, is reversal. That remedy is not disproportionate to the evil that it seeks to deter. The overriding policy behind the UCMJ is to insure that the military justice system is free from unlawful command influence. Fairness dictates that the government bear the responsibility of keeping the proceedings free from such influence.

By its holding, the court below implied that reversal is too costly a remedy for unlawful command influence. However, refusal to reverse convictions for demonstrated unlawful command influence imposes unacceptable costs. The only way to ensure even minimal enforcement of Article 37, UCMJ, is to reverse petitioners' convictions.

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19 M.J. 170 (C.M.A. 1985) (commanding general required court members in a prosecution for sale of drugs to hear, during a court recess, a speech of the Marine Corps Commandant that drug trafficking was intolerable in the military and that drug traffickers should be out of the Marine Corps); United States v. Karlson, 16 M.J. 469 (C.M.A. 1983) (court members discussed concern of the commanding general that sentences were not severe enough and such results would be remedied by appointing more commanders as court members); United States v. Rosser, 6 M.J. 267 (C.M.A. 1979) (commander indicated to court member and witnesses at courtroom door that things would be better if he could get particular soldiers properly taken care of); United States v. Toon, 48 C.M.R. 139 (A.C.M.R. 1973) (*en banc*) (court members were made aware of command policy to confine and punitively discharge all drug dealers); United States v. Dubay, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967) (attempt by commander to control trial results in 93 cases through an unauthorized means of appointing courts with an "appropriate" command orientation); United States v. Fowle, 7 U.S.C.M.A. 349, 22 C.M.R. 139 (1956) (Navy policy to separate with punitive discharges all sailors convicted of larceny or any other offense involving moral turpitude); United States v. Littrice, 3 U.S.C.M.A. 487, 13 C.M.R. 43 (1953) (unlawful command action designed to eliminate thieves from the Army). In all of these cases the military appellate courts have remedied both the perception of unfairness and the actual prejudice stemming from the commanders' unlawful actions by reversing the results of the trial courts.

III. THE COURT'S EXERCISE OF ITS SUPERVISORY AUTHORITY IS CRUCIAL TO CORRECT THE EGREGIOUS AND UNPRECEDENTED CASE OF UNLAWFUL COMMAND INFLUENCE WHICH RESULTED IN THE DENIAL OF PETITIONERS' DUE PROCESS RIGHTS AND WHICH THE MILITARY COURTS HAVE LEFT UNREMEDIED.

With the establishment of the Court as the court of final review for court-martial convictions, 28 U.S.C. § 1259(3) (Supp. II 1984), the previous belief that the Court's review of military justice is limited to jurisdictional issues[34] is no longer valid. Clearly the Court has supervisory authority over the administration of military justice. There is a compelling need for the Court to exercise that authority in the instant cases.[35]

The military justice system has failed to protect petitioners' constitutional rights. The provisions[36] enacted to curb command control failed to prevent MG Anderson's assault on the fair administration of justice within his command. Even the Court of Military Appeals, which was created to reduce the level of command control over the military justice system,[37] has fallen short of its obligation to stand sentinel against undue prejudicial command control.[38] Despite its recognition of

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[34] *See Burns*, 346 U.S. at 147 (Minton, J. concurring) ("We have no supervisory power over the administration of military justice, such as we have over civil justice in the federal courts. . . . We have but one function, namely, to see that the military court has jurisdiction, not whether it has committed error in the exercise of that jurisdiction.")

[35] This is even more compelling in light of creeping expansion of military jurisdiction. *See* United States v. Solorio, 21 M.J. 251 (C.M.A. 1986), *cert. granted*, ___ U.S. ___, 106 S.Ct. 2914 (1986).

[36] *See* Articles 37 and 98, UCMJ.

[37] *Mundy*, 554 F.Supp. at 820. *See also Senate Hearings on S. Res. 260*, 87th Cong., 2d Sess. 45, 307 (1962) (statements of Mr. E. M. Morgan, Professor of Law, Harvard University, Chairman of the Committee which drafted the UCMJ); West, *A History of Command Influence on the Military Justice System*, 18 U.C.L.A. L. Rev. 1 (1970).

[38] In fact, there remains some skepticism as to the lower court's ability to eliminate command control over the court-martial process. It has been concluded,

> "Experience has shown . . . that the Court of Military Appeals is a decidedly weak court in eliminating command influence in military

its role as "civilian overseer for the military justice system," the court below merely echoed a hollow threat that consideration of "much more drastic remedies" would be necessary should other incidents of illegal command influence recur in other commands in the future. *Thomas*, 22 M.J. at 400. Such admonishments are meaningless to petitioners. The denial of their constitutional due process rights remains unremedied. It is up to the Court to right the miscarriage of justice.

"No single aspect of our society is more precious and more distinctive than that we seek to administer criminal justice according to morally fastidious standards." *Dennis v. United States*, 339 U.S. 162, 184 (1950) (Frankfurter, J., dissenting). Reversal of petitioners' convictions would effectively enforce Congress' intent to eliminate improper command influence, restore the eroded public confidence in military justice, and enhance the defense posture of our nation.

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trials. Military commanders have openly overridden the law in this regard, and there is no assurance that they will not do so in the future. The long-standing refusal of military commanders to submit to the rule of law established by Congress for the operation of military courts reflects a serious loss of control over military leaders by Congress."

Mundy, 554 F. Supp. at 821 n.31 (citation omitted). "The Court of Military Appeals has still a long way to go to eliminate command control over the court-martial process." *Id.* at 821.

CONCLUSION

For the foregoing reasons, including the importance of the due process issue involved, the petition for certiorari should be granted. The questions presented are substantial and of first impression before the Court. Their resolution will be of great significance to military justice.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

Nos. 48,011, 51,496, 52,896 and 53,423.
CM 443527, CM 444195, SPCM 20588 and CM 444804

UNITED STATES, APPELLEE,

v.

ROGER E. THOMAS, SPECIALIST FOUR,
U.S. ARMY, APPELLANT.

UNITED STATES, APPELLEE,

v.

FRANKLIN K. COOK, JR., STAFF SERGEANT,
U.S. ARMY, APPELLANT.

UNITED STATES, APPELLEE,

v.

DONALD J. GIARRATANO, SPECIALIST FIVE,
U.S. ARMY, APPELLANT.

UNITED STATES, APPELLEE,

v.

KURT R. GONZALES, PRIVATE, U.S ARMY, APPELLANT.

Sept. 22, 1986

For Appellant (Thomas): *Captain H. Alan Pell* (argued); *Colonel William G. Eckhardt, Lieutenant Colonel William P. Heaston, Lieutenant Colonel Paul J. Luedtke, Major Edwin D. Selby, Captain Craig E. Teller, Captain Audrey H. Liebross.*

For Appellee: *Captain Erik M. Stumpfel* (argued); *Colonel James Kucera, Lieutenant Colonel Gary F. Roberson, Lieutenant Colonel Adrian J. Gravelle, Lieutenant Colonel Thomas M. Curtis, Captain Samuel J. Rob.*

For Appellant (Cook); *Lieutenant Colonel William P. Heaston* (argued); *Colonel William G. Eckhardt, Colonel Brooks B. La Grua, Major Edwin D. Selby, Captain Lorraine Lee.*

For Appellee: *Captain Samuel J. Rob* (argued); *Colonel James Kucera, Lieutenant Colonel Adrian J. Gravelle, Lieutenant Colonel Thomas M. Curtis, Lieutenant Colonel Gary F. Roberson.*

For Appellant (Giarratano): *Captain Craig E. Teller* (argued); *Colonel Brooks B. La Grua, Lieutenant Colonel William P. Heaston, Lieutenant Colonel Paul J. Luedtke, Major Eric T. Franzen, Captain Lorraine Lee.*

For Appellee: *Captain Samuel J. Rob* (argued); *Colonel James Kucera, Lieutenant Colonel Gary F. Roberson, Lieutenant Colonel Adrian J. Gravelle.*

For Appellant (Gonzales): *Captain Lorraine Lee* (argued); *Lieutenant Colonel Paul J. Luedtke* and *Major Eric T. Franzen.*

For Appellee: *Captain Erik M. Stumpfel* (argued); *Colonel James Kucera, Lieutenant Colonel Gary F. Roberson, Lieutenant Colonel Adrian J. Gravelle.*

OPINION OF THE COURT

EVERETT, Chief Judge:

These four cases, all argued on the same day, are among many received by this Court and by the United States Army Court of Military Review which question the fairness of the court-martial proceedings because of certain acts and comments of Major General Thurman E. Anderson, the Commanding General of Third Armored Division, and members of his staff.

During one or more briefings conducted among officers and noncommissioned officers within his command, General Anderson addressed the subject of testifying at an accused's court-martial. He stated that he found it paradoxical for a unit commander, who had recommended that an accused be tried by a court-martial authorized to adjudge a punitive dis-

charge, to later appear as a defense character witness at the sentencing stage of the trial, testify as to the accused's good character, and recommend that the convicted soldier be retained in the service. Some of General Anderson's remarks were elaborated upon and possibly distorted by his subordinates. Be that as it may, his comments were later interpreted, or misinterpreted, to reflect an intent that a commander, first sergeant, or other person from an accused's unit, should not give favorable presentencing testimony on behalf of an accused. This interpretation may have also extended to findings.[1]

Based on the record of trial in appellant Giarratano's case and on the special findings by the military judge in that case[2], the Court of Military Review concluded that command influence was present at the Third Armored Division. *United States v. Treakle*, 18 M.J. 646 (A.C.M.R.1984). Depending on the facts of each case, the Court of Military Review fashioned several different remedies. These included sentence rehearings, if the record failed to show affirmatively that, in sentencing, the court members had not in fact been influenced by General Anderson's comments, *United States v. Treakle, supra* at 658-59; rehearings or reassessment of the sentence, if the record failed to show why the defense had not produced any character witnesses or if one or more witnesses who testified appeared to have been negatively influenced by General Anderson's remarks, *United States v. Schroeder*, 18

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[1] A detailed summary of the facts may be found in Part II of *United States v. Treakle*, 18 M.J. 646, 649-52 (through the first paragraph in the right column on page 652) (A.C.M.R. 1984).

[2] In *United States v. Giarratano*, the military judge found that the oral comments of General Anderson and the oral and written comments of his subordinates would logically cause members of the Third Armored Division to conclude that the commander who refers charges for trial to a general court-martial or special court-martial authorized to adjudge a bad-conduct discharge believes that the accused is guilty and should be punitively discharged and that any extenuation and mitigation testimony favorable to the accused should be ignored as meaningless or incredible. The military judge determined in *Giarratano* that the comments – taken together and in context – would reasonably cause an accused to be convicted more readily or subjected to a heavier sentence.

M.J. 792 (A.C.M.R.1984); *United States v. Hill*, 18 M.J. 757 (A.C.M.R.1984); and limited hearings to determine whether the accused had been deprived of character witnesses at the sentencing stage of the trial, *United States v. Abelon*, 19 M.J. 767 (A.C.M.R.1984); *United States v. Thompson*, 19 M.J. 690 (A.C.M.R.1984).

When additional information came to the attention of the Court of Military Review in the form of affidavits prepared by two officers from the Third Armored Division, that court first began to take remedial action at both the findings and post-trial review stages of the proceedings.[3] Thus, in *United States v. Mitchell*, 19 M.J. 905 (A.C.M.R.1985), the Court ordered a limited hearing on whether the court members had heard General Anderson's remarks and were influenced by them. If so, the findings and sentence were to be set aside and a rehearing ordered. In *United States v. Glidewell*, 19 M.J. 797 (A.C.M.R.1985), the Court of Military Review ordered a new review and action; and in *United States v. Scott*, 20 M.J. 1012 (A.C.M.R.1985); *United States v. Abelon* and *United States v. Thompson*, both *supra*, limited hearings were ordered to determine, among other issues, whether General Anderson was disqualified from reviewing and taking action on the case.

With this background, we now turn to the central issue of these cases:

> Were the remedial actions taken by the Court of Military Review appropriate and adequate, under the circumstances of each case, to eliminate the prejudicial impact of unlawful command influence found to have been exer-

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[3] These officers were Lieutenant Colonel Mueller and Major Buchanan. Briefly summarized, Lieutenant Colonel Mueller's affidavit stated that he had been informed by Lieutenant Colonel Bozeman, the staff judge advocate of Third Armored Division, that General Anderson was displeased because Colonel Mueller had testified as a defense witness at the trials of two accused. Bozeman allegedly told Mueller that if a commander recommends trial by a court-martial authorized to adjudge a punitive discharge, he must believe that the accused is guilty and should be eliminated from the service. Major Buchanan's affidavit corroborates Mueller's statement. He alleges that Bozeman stated that neither he nor the commander believed that it was proper for Mueller to testify as a defense witness.

cised within the Third Armored Division, or did General Anderson's comments have such a deleterious effect on the judicial process that even more drastic action, such as automatic reversal of the findings and sentence, is required?

In answering this question, we will begin by considering the general's actions at the referral stage of the trial, proceed through the findings and sentence, and end with the final review and action by the convening authority.

I

Preliminary Observations

Command influence is the mortal enemy of military justice. Therefore, in the Uniform Code of Military Justice, Congress specifically prohibited such activity. Art. 37, 10 U.S.C. § 837; *see also* Art. 98, UCMJ, 10 U.S.C. § 898. Subsequently, the Military Justice Act of 1968 expanded the command-influence prohibitions of Article 37. Pub.L. No. 90-632, § 2(13), 82 Stat. 1338. Indeed, a prime motivation for establishing a civilian Court of Military Appeals was to erect a further bulwark against impermissible command influence. *See* Hearings on H.R. 2498 Before a Subcomm. of the House Committee on Armed Service, 81st Cong., 1st Sess. 608 (1949).

The exercise of command influence tends to deprive servicemembers of their constitutional rights. If directed against prospective defense witnesses, it transgresses the accused's right to have access to favorable evidence. U.S. Const. amend. VI; *cf.* Art. 46, U.C.M.J., 10 U.S.C. § 846. If directed against defense counsel, it affects adversely an accused's right to effective assistance of counsel. *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938); U.S. Const. amend. VI; *cf.* Art. 27, UCMJ, 10 U.S.C. § 827, and Art. 37. If the target is a court member or the military judge, then the tendency is to deprive the accused of his right to a forum where impartiality is not impaired because the court personnel have a personal interest in not incurring reprisals by the convening authority due to a failure to reach his intended

result. *Cf. Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); *United States v. Accordino*, 20 M.J. 102 (C.M.A.1985).

Under *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), a constitutional violation has been considered prejudicial unless the reviewing court concludes beyond a reasonable doubt that the trial result was not affected by the error. *Cf. United States v. Remai*, 19 M.J. 229 (C.M.A.1985). We observe that in some recent cases the Supreme Court seems to have retreated slightly from this standard. *Cf. United States v. Bagley*, ___ U.S. ___, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). However, in *Bagley*, the Supreme Court continued to apply the beyond-reasonable-doubt test where the prosecution knowingly used perjured testimony. The justification for employing this strict standard is "that the knowing use of perjured testimony involves prosecutorial misconduct and, more importantly, involves 'a corruption of the truth-seeking function of the trial process.' " 105 S.Ct. at 3382.

This rationale applies equally to command influence. A commander who causes charges to be preferred or referred for trial is closely enough related to the prosecution of the case that the use of command influence by him and his staff equates to "prosecutorial misconduct." Indeed, recognizing the realities of the structured military society, improper conduct by a commander may be even more injurious than such activity by a prosecutor. Likewise, as was perfectly clear to Congress when it enacted the Uniform Code of Military Justice and the Military Justice Act of 1968–and as the judges of this Court have always understood–command influence "involves 'a corruption of the truth-seeking process.' "

Consequently, in cases where unlawful command influence has been exercised, no reviewing court may properly affirm findings and sentence unless it is persuaded beyond a reasonable doubt that the findings and sentence have not been affected by the command influence.

II

Referral for Trial

Articles 22-24, UCMJ, 10 U.S.C. §§ 822-824, respectively, prescribe who may convene various types of courts-martial. If a court-martial is convened by someone who is not in one of the categories set forth in those articles, then its action can be set aside for lack of jurisdiction. Articles 22(b) and 23(b) also direct that an officer shall not convene a general or special court-martial, if he "is an accuser." According to Article 1(9),UCMJ, 10 U.S.C. § 801(a) an "accuser" is "a person who signs and swears to charges . . . and any other person who has an interest other than an official interest in the prosecution of the accused."

Despite General Anderson's misguided zeal, his initial interest in the various prosecutions was official, rather than personal. Unlike the convening authority in *United States v. Gordon*, 1 U.S.C.M.A. 255, 2 C.M.R. 161 (1952), whose house had been broken into by the accused, General Anderson had not suffered an injury to his person or property. Unlike the convening authority in *United States v. Crossley*, 10 M.J. 376 (C.M.A.1981), and in *United States v. Shepherd*, 9 U.S.C.M.A. 90, 95-100, 25 C.M.R. 352, 357-62 (1958), his ego was not directly assailed by the accused's actions. Unlike the convening authority in *United States v. Corcoran*, 17 M.J. 137 (C.M.A.1984), and in *United States v. Marsh*, 3 U.S.C.M.A. 48, 11 C.M.R. 48 (1953),[4] his authority was not willfully flouted.

At a later time, after the wholesale exercise of command influence had come to light, the situation changed somewhat. At that point, General Anderson and his staff judge advocate, Lieutenant Colonel John R. Bozeman, were being attacked repeatedly, and the general probably had become quite defensive about his prior remarks. Perhaps, he then possessed a disqualifying personal interest in the outcome of cases to be referred. However, even then any defect in referral would not have been jurisdictional. *Cf. United States v.*

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[4] *Marsh* was itself an extreme case and has been greatly restricted by *United States v. Teal*, 4 U.S.C.M.A. 39, 15 C.M.R. 39 (1954); and *United States v. Keith*, 3 U.S.C.M.A. 579, 13 C.M.R. 135 (1953).

Ridley, 22 M.J. 43 (C.M.A.1986); *United States v. Blaylock*, 15 M.J. 190 (C.M.A.1983). Thus, the findings and sentence would not be void but would only be subject to being set aside upon appellate review.

Another claim that has been presented with respect to referrals is that General Anderson's remarks may have led unit commanders to recommend a higher echelon of court-martial than otherwise might have been utilized. However, as we understand the tenor of his comments, they were directed chiefly towards conduct of prospective witnesses after charges had been preferred, and they tended to cut off testimony in an accused's behalf only after a recommendation for his court-martial had been made. Thus, during processing of charges before referral, General Anderson's comments would not have adversely affected an accused. Conceivably, those remarks might even have benefited an accused because if his unit commander entertained a favorable opinion of him, that commander might have utilized nonjudicial punishment or administrative action, instead of seeking trial by court-martial where the results might prove to be too harsh.

III

Findings Based on Pleas of Guilty

In many of the cases referred by General Anderson, guilty pleas were entered – usually pursuant to pretrial agreements. Now it is contended that these accused should be allowed to withdraw these pleas and that the findings based thereon should be vacated. One rationale for this argument is that the pleas were involuntary because evidence available to such an accused was curtailed by General Anderson's actions, so guilty pleas were entered merely by reason of the hopeless predicament in which the accused had been placed. Another argument is that the actions of General Anderson were so pernicious that, *per se*, they tainted every proceeding with which he had any contact. *Cf. United States v. Treakle, supra* at 663 (Yawn, J., concurring in part and dissenting in part).

We are not persuaded by these arguments. In the first place, we are unable to find in the records before us any accused who entered a guilty plea because of the unavailability of witnesses who, in the absence of General Anderson's interference, might have testified at trial. Certainly, no such claim has been brought to our attention. *Cf. Hill v. Lockhart*, ___ U.S. ___, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

In this connection, we note that in trials by court-martial there is special concern that an accused's pleas of guilty be provident and that a plea of guilty not be accepted unless an accused truly believes that he is guilty. Article 45 of the Uniform Code of Military Justice, 10 U.S.C. § 845, requires that a guilty plea be vacated if the accused offers evidence inconsistent therewith. Moreover, the providence inquiry prescribed by this Court requires that an accused who pleads guilty be questioned by the judge about the relevant facts in order to establish a factual basis for the plea. *See United States v. King*, 3 M.J. 458 (C.M.A.1977); *United States v. Green*, 1 M.J. 453 (C.M.A.1976). From his own lips, such an accused must affirm that he knows he is guilty of the elements of the offense or that – if he lacks such knowledge for some reason, such as amnesia – he is satisfied as to the existence of the facts establishing his guilt. *See United States v. Butler*, 20 U.S.C.M.A. 247, 43 C.M.R. 87 (1971). Moreover, as an added guarantee of the accuracy of the guilty plea, the President has prescribed in the Manual for Courts-Martial (1984) that an accused shall be under oath when he testifies at a providence hearing. R.C.M. 910(e), Manual for Courts-Martial, United States, 1984.

Thus, the situation in courts-martial is unlike that which prevails in many civilian courts, where a plea of guilty may be accepted even though a defendant maintains his innocence. *Cf. North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed. 2d 162 (1970). Because of these limitations, military justice usually is not characterized by the extensive prosecutorial arm-twisting to obtain guilty pleas that exists in some civilian courts. *Cf. Bordenkircher v. Hayes*, 434 U.S. 357, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978).

In view of the safeguards surrounding the entry of guilty pleas by accused servicemembers, we perceive no unfairness in letting stand the guilty pleas entered in cases from the Third Armored Division. The possibility that, if General Anderson had not interfered, an accused who entered pleas of guilty might have pleaded not guilty, introduced evidence, and obtained an acquittal is so remote that it does not disturb us – especially where no specific claim to this effect has been made. In these cases, we are persuaded beyond a reasonable doubt that the findings based on these provident guilty pleas were not affected by command influence.

Admittedly, we must be concerned not only with factual accuracy of a trial result but also with the procedures employed in obtaining it. *Cf. Rogers v. Richmond*, 365 U.S. 534, 81 S.Ct. 735, 5 L.Ed.2d 760 (1961). For instance, a coerced waiver of the privilege against self-incrimination may require relief, even though the incriminating evidence which is obtained thereby leads to an accurate finding of guilt. However, any indirect pressure to plead guilty generated by General Anderson was of far less magnitude than that which has been regularly tolerated by the Supreme Court. *Cf. Bordenkircher v. Hayes, supra.* Moreover, there is no indication that any of General Anderson's command-influence activities were intended to induce guilty pleas. Accordingly, we conclude that any guilty pleas entered pursuant to the providence-inquiry procedures previously prescribed by this Court should not be withdrawn, and the findings of guilty entered pursuant to such pleas can be upheld.

IV

Findings Based on Pleas of Not Guilty

In determining whether an accused's trial in a contested case before court members was adversely affected by command influence, we first consider the impact that such activities and communications may have had on the court members. In this regard, we place the burden upon both defense and trial counsel, as well as the military judge, to fully question the court members during voir dire and to de-

termine thereby whether any of the members had knowledge of the commander's comments and, if so, whether the comments had an adverse impact on the member's ability to render an impartial judgment. When required, witnesses may be called to testify on this issue. *United States v. Karlson*, 16 M.J. 469 (C.M.A. 1983). However, we are not prepared to disqualify members of a court-martial panel simply because they were assigned or were in close proximity to the command where the comments were made. To do so would ignore the members' oath to adhere to the military judge's instructions and to determine the facts in accordance therewith. *Cf. United States v. Garwood*, 20 M.J. 148 (C.M.A.1985).

In cases tried by military judge alone, we have no reason to believe that the command influence would have had any impact on the judges, who were completely independent of General Anderson and of other commanders in the field. Moreover, absent some specific claim to the contrary, we shall not assume that an accused chose trial by judge alone because of concerns about the impartiality of the court members.

In contested cases tried by members or by judge alone, a second question is whether the commander's comments so impeded the accused's access to defense witnesses that he was deprived of his sixth-amendment right to have witnesses called on his behalf. As already noted, the standard we shall use in testing for prejudice in this regard is that of *Chapman v. California, supra. Cf. United States v. Remai, supra.*

In view of this high standard, if an accused properly raises the issue that his ability to secure favorable evidence has been impaired, the Government obviously bears a heavy burden in establishing that defense access to witnesses (character or otherwise) was not impeded by command influence to the extent that it affected the results of trial. Indeed, appellate defense counsel might well argue that the Government can never overcome this heavy burden because there will always be a possibility that a witness might have been available who could have tipped the scales in the defense's behalf.

In this connection, we draw a distinction between two classes of witnesses: (a) character witnesses, and (b) witnesses who will testify on matters other than an accused's character. As to the former, there was the greater likelihood that testimony would be inhibited by General Anderson's remarks. It is questionable whether his remarks could have been construed to apply to the latter class of witnesses.

To satisfy its burden of demonstrating that an accused was not deprived of favorable character witnesses, the Government might elect to proceed in one of several ways. The first would be to show that appellant had offered extensive favorable character evidence at trial, so that it could be inferred that General Anderson's remarks had not inhibited the availability of character witnesses. A second way would be to demonstrate from the accused's military records and otherwise that there simply was no evidence of good character available or that readily available rebuttal evidence of bad character would have been so devastating that, as a tactical matter, the accused could not have afforded the risk of putting his character in evidence. A third way for the Government to meet its burden might be to demonstrate that the prosecution evidence at trial was so overwhelming that there was no way in which the character evidence could have had an effect. This latter alternative should be used very sparingly, however: First, we recognize that character evidence can be very effective in creating reasonable doubt at trial; and, second, we do not wish to create even an appearance of condoning command influence on findings.

For witnesses other than character witnesses, the prosecution can satisfy its burden by demonstrating that everyone who had relevant information testified at trial and that none of these witnesses felt under any pressure to testify in a certain way. Another way would be to show that, although some persons with relevant information did not testify, these testimony would have been unfavorable to the accused.

V

Sentencing

In gauging the effect of command influence on an accused's sentence, the same approach should be used as for findings in contested cases. If the issue is properly raised, the burden is on the Government to establish beyond a reasonable doubt that favorable evidence in extenuation and mitigation was not curtailed by General Anderson's command activities. To satisfy this burden, the Government may demonstrate by an accused's military records or otherwise that no favorable evidence relevant to an accused's service in the Third Armored Division was available, as evidenced by his military records and otherwise, or that the defense made an informed decision not to present such evidence because it would have opened the door to damaging rebuttal evidence readily available to the prosecutor. If the record fails to show that the Government has met its burden, a rehearing on sentence or meaningful reassessment of the sentence, if possible, would be the appropriate remedy.

We note that there is no indication that, in appointing court members, General Anderson sought to name persons who were predisposed to adjudge heavy sentences. *Cf. United States v. McClain*, 22 M.J. 124 (C.M.A.1986). Of course, if he had followed this policy, resentencing would be in order because of the violation of Article 37.

VI

Review and Action

The Court of Military Review has directed new post-trial reviews in cases where the initial review was performed by General Anderson. Avoidance of any appearance of evil provides ample justificatiion for requiring this procedure. Moreover, in many of the cases he reviewed, General Anderson was confronted with claims that his command influence had prejudiced the accused at trial and necessitated major remedial action. He could hardly be expected to review impartially contentions that his own acts had transgressed Article 37 and had violated the rights of the accused.

VII

We shall now apply these principles to the four cases presently under consideration.

United States v. Thomas (Docket No. 48011/AR):

Specialist Four Thomas was originally tried by a military judge sitting alone as a general court-martial on October 25, 1982. Pursuant to his negotiated pleas, he was found guilty of aggravated assault, violation of a lawful general regulation by possessing a switchblade knife, and committing an assault and battery with his fists, in violation of Articles 128 and 92, UCMJ, 10 U.S.C. §§ 928 and 892, respectively. His sentence to a dishonorable discharge, confinement for 12 months, total forfeitures, and reduction to the grade of E-1 was approved by General Anderson on December 14, 1982.

As the issue of command influence in this case had first been raised in this Court, the record was remanded to the Court of Military Review in January 1984. That Court ordered a rehearing on sentence because of the few witnesses who had testified on behalf of the appellant during the sentence proceedings. At the sentence rehearing conducted by direction of the Commander, 1st Infantry Division (Mech), the defense introduced stipulations of expected testimony from Thomas' platoon leader and squad leader and favorable evidence regarding his performance while he was confined and while he was employed when on excess leave. He was sentenced to a bad-conduct discharge, confinement for 10 months, total forfeitures, and reduction to the lowest enlisted grade. The new general court-martial convening authority reduced the period of confinement to 8 months but otherwise approved the sentence as adjudged. On August 2, 1985, the Court of Military Review affirmed the sentence adjudged at the rehearing.

The remedy adopted by the Court of Military Review eliminated any possibility of prejudice. Our examination of the providence inquiry convinces us that Thomas' pleas of guilty were not affected by the command-influence problem and were based upon his belief in his own guilt. The rehearing on sentence and the action by a new reviewing authority

remedied any problems which may have existed at these stages of the proceedings. Accordingly, we conclude that the decision of the Court of Military Review is correct.

United States v. Cook (Docket No. 51496/AR):

Sergeant Cook was tried before a military judge alone on February 10, 1983. Pursuant to his negotiated pleas, he was found guilty of unauthorized absence, resisting apprehension, escape from custody, possession of hashish, and two bad-check offenses, in violation of Articles, 86, 95, 134, and 123a, UCMJ, 10 U.S.C §§ 886, 895, 934, and 923a, respectively. He was sentenced to a bad-conduct discharge and reduction to the grade of E-1. The findings and sentence were approved by General Anderson on April 23, 1984. On October 31, 1984, the Court of Military Review set aside the bad-conduct discharge because "no one from appellant's . . . command testified during sentencing" and "[t]he record provide[d] no explanation" as to why such witnesses did not appear. Unpublished opinion at 3.

The substantial reduction of the sentence by the Court of Military Review eliminated any possibility that Sergeant Cook was prejudiced by the absence of character witnesses during the sentencing stage of his trial. Likewise, appellant could not have been prejudiced by the failure of the Court of Military Review to order a new review and action by another convening authority. It is highly unlikely that any new convening authority would equal the sentence relief given by the Court of Military Review. Accordingly, we conclude that the decision of the Court of Military Review is correct.

United States v. Giarratano (Docket No. 52896/AR):

After hearing the voluminous evidence presented on the command-influence issue, the military judge found that no person in Giarratano's chain of command had attended any of General Anderson's meetings and none had discussed the charges against Giarratano with General Anderson. He nevertheless found that the following remedial actions were required:

> (1) If the accused elected trial by members, he would "sustain any [defense] challenge for cause against a panel member who was a member of a Third Armored Division

unit prior to 4 March 1983" (date General Anderson first attempted to clarify or retract some of his earlier statements).

(2) Although "no member of" Giarratano's "chain of command testified that they were unlawfully directed or influenced not to testify" on his behalf and none expressed "any fear of" reprisal if they did so, the military judge ruled, as a matter of caution, that no character evidence would be received which was "unfavorable to the accused."

(3) As General Anderson's "credibility [was] called into question," the military judge found that the general was disqualified from taking action on the case.

Thereafter, Giarratano elected to be tried by judge alone. He made no claim that his choice was based on any fear that a court-martial composed of members would be unable to render a fair verdict. Contrary to his pleas, he was found guilty of distributing hashish, in violation of Article 134, USMJ, 10 U.S.C. § 934. The evidence to prove his guilt was overwhelming. The Government showed that Giarratano sold three pieces of hashish to two undercover agents. The defense presented no evidence on the merits. Except for Giarratano's own sworn statement during the presentencing stage of the trial, no other witnesses were called by the defense. Trial defense counsel had informed the military judge at an earlier stage of the trial, however, that he was "not aware of any chilling effect upon potential witnesses in the case." Giarratano's sentence to a bad-conduct discharge, confinement for 3 months, forfeiture of $100.00 pay per month for 3 months, and reduction to the grade of E-1 was approved by the Commander, 21st Support Command, on April 12, 1984. The Court of Military Review affirmed. 20 M.J. 553 (A.C.M.R.1985).

We perceive no basis for concluding that the convening authority was disqualified to refer the case for trial. The extensive findings of fact in *Giarratano* and the remedial actions taken by the military judge eliminated any possibility of prejudice at either the findings, sentencing, or review stages of the proceedings. Accordingly, we conclude that the decision of the Court of Military Review is correct.

United States v. Gonzales (Docket No. 53423/AR):

The remedy employed by the Court of Military Review in this case was the same as that in *United States v. Thomas.* Gonzales was tried on July 21, 1983, by a military judge sitting alone as a general court-martial. Pursuant to his pleas, he was convicted of two specifications of distribution of marijuana; using a false pass; as well as possession of hashish and marijuana with intent to distribute, in violation of Article 134, UCMJ, 10 U.S.C. § 934. He was sentenced to a dishonorable discharge, confinement for 16 months, total forfeitures, and reduction to the grade of E-1. Adhering to the terms of a pretrial agreement, General Anderson approved the sentence but suspended confinement in excess of 14 months for a period of 6 months.

On November 5, 1984, the Court of Military Review permitted a rehearing on sentence if ordered by a different convening authority because no witnesses had testified for appellant and the record was silent as to why such witnesses were absent. At the sentence rehearing conducted in January 1985, the defense presented, by way of stipulation, favorable testimony from Gonzales' former platoon sergeant. The defense also assured the military judge that other potential witnesses had been contacted but that the defense had elected not to produce them. Gonzales' sentence at the rehearing to a dishonorable discharge, confinement for 10 months, total forfeitures, and reduction to the lowest enlisted grade was approved by the Commander, Fort Leavenworth, on February 11, 1985. This sentence was affirmed by the Court of Military Review on June 25, 1985.

At the time of referral, General Anderson was not disqualified to act as a convening authority. The sentence rehearing and action by a different convening authority cured any prejudicial error that may been caused by General Anderson's remarks. Accordingly, we conclude that the decision of the Court of Military Review is correct.

VIII

Epilogue

In all four of these cases, we have upheld the decision of the Court of Military Review. Lest our action be construed as a tacit acceptance of illegal command influence in military justice, we emphasize that the decisions of the court below were preceded by extensive remedial action at that level. Indeed, we commend that court for recognizing the inherent dangers caused by illegal command influence and for deciding each case in a manner consistent with legislative intent and prior case law.

This Court understands the desire of military commanders to assure that the members of their commands adhere to high standards of discipline. Certainly, we do not wish to inhibit lawful zeal in achieving this end. However, Congress, in its wisdom and pursuant to powers conferred upon it by the Constitution, has placed limits on the means that can be employed by commanders in seeking to maintain discipline. Moreover, we are convinced that most commanders understand full well the reasons why in our democratic society Congress considered these limitations to be appropriate.

One of the most sacred duties of a commander is to administer fairly the military justice system for those under his command. In these cases, the commander, for whatever reason, failed to perform that duty adequately. Likewise, it is also apparent either that his legal advisor failed to perceive that a problem was developing from General Anderson's stated policies or that he was unable or unwilling to assure that the commander stayed within the bounds prescribed by the Uniform Code of Military Justice. The delay and expense occasioned by General Anderson's intemperate remarks and by his staff's implementation of their understanding of those remarks are incalculable. Several hundred soldiers have been affected directly or indirectly – if only because of the extra time required for completing appellate review of their cases. In addition, the military personnel resources – as well as those of this Court – required to identify and to surgically remove any possible impact of General Anderson's over-

reaching have been immense. Finally, and of vital importance, the adverse public perception of military justice which results from cases like these undercuts the continuing efforts of many – both in and out of the Armed Services – to demonstrate that military justice is fair and compares favorably in that respect to its civilian counterparts.

A primary responsibility of this Court in its role as civilian overseer for the military justice system is to ensure that commanders perform their military-justice responsibilities properly and that they are provided adequate guidance by their legal advisors in performing those responsibilities. Merely remedying the error in the cases before us is not enough. Instead, we wish to make it clear that incidents of illegal command influence simply must not recur in other commands in the future.

Recognizing that military commanders and judge advocates usually exert themselves in every way to comply with both the spirit and the letter of the law, we are confident that events like those involved here will not be repeated. However, if we have erred in this expectation, this Court – and undoubtedly other tribunals – will find it necessary to consider much more drastic remedies.

The decisions of the United States Army Court of Military Review in Number 48,011 (Thomas); 51,496 (Cook); 52,896 (Giarratano); and 53,423 (Gonzales) are affirmed.

Judge SULLIVAN did not participate.[5]

COX, Judge (concurring):

I concur with Chief Judge EVERETT and join him in recognizing the hard work put into these cases by the Court of Military Review and appellate counsel, both for the Government and the defense. I am satisfied that as a result of the careful scrutiny given each record of trial, any possible prejudice that a soldier may have suffered has been ferreted out and corrected. If not, the doors of this Court remain open to hear particularized claims of prejudice.

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[5] Judge Sullivan did not participate in the decision of any other case involving the issues decided herein.

APPENDIX B

United States v. Thomas

Specialist Four Roger E. Thomas was referred to a general court-martial on October 20, 1982. He was tried before a military judge alone on October 25, 1982, and was convicted, pursuant to his pleas, of aggravated assault, violation of a lawful general regulation by possessing a switchblade knife, and assault and battery. The adjudged sentence included a dishonorable discharge, confinement for 12 months, total forfeitures, and reduction to the grade of E-1. The findings and sentence were approved by MG Anderson on December 14, 1982 and affirmed by the Army Court of Miliary Review in an unpublished opinion, CM 443527 (A.C.M.R. 22 Sep. 1983) (Appendix B-1).

The issue of command influence was first raised at the Court of Military Appeals. That court remanded the case to the Army court which ordered, on September 19, 1984 (Appendix B-2), a rehearing on sentence because of the few witnesses who had testified on behalf of petitioner during the sentencing proceedings. At the rehearing petitioner was sentenced to a bad-conduct dicharge, confinement for ten months, total forfeitures, and reduction to the lowest enlisted grade. The new convening authority reduced the period of confinement to eight months but otherwise approved the sentence. On August 2, 1985, the Army court affirmed the sentence adjudged at the rehearing (Appendix B-3). On October 22, 1986, the Court of Military Appeals affirmed the decision of the Army court and held that the sentence rehearing and a new action by a different convening authority remedied any prejudice petitioner suffered. *Thomas*, 22 M.J. at 398.

APPENDIX B-1

UNITED STATES ARMY COURT OF MILITARY REVIEW

CM 443527

UNITED STATES, APPELLEE

v.

SPECIALIST FOUR ROGER E. THOMAS, SSN 083-54-1120, UNITED STATES ARMY, APPELLANT

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22 September 1983

Colonel William G. Eckhardt, JAGC, Lieutenant Colonel R. Rex Brookshire II, JAGC, Major Robert C. Rhodes, JAGC, Captain James A. McAtamney, JAGC, and Captain Audrey H. Liebross, JAGC, were on the pleadings for appellant.

Colonel James Kucera, JAGC, Lieutenant Colonel John T. Edwards, JAGC, Major Thomas M. Curtis, JAGC, and Captain Samuel J. Rob, JAGC, were on the pleadings for appellee.

Before MELNICK, McKAY and DELL'AQUILA, Appellate Military Judges

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MEMORANDUM OPINION

Per Curiam:

The Court having found the approved findings of guilty and the sentence correct in law and fact and having determined on the basis of the entire record that they should be approved, such findings of guilty and the sentence are *AFFIRMED.*

Senior Judge MELNICK absent.

FOR THE COURT:

/s/ WILLIAM S. FULTON, JR.
William S. Fulton, Jr.
Clerk of Court

APPENDIX B-2

UNITED STATES ARMY COURT OF
MILITARY REVIEW

CM 443527

UNITED STATES, APPELLEE

v.

SPECIALIST FOUR ROGER E. THOMAS, SSN 083-54-1120,
UNITED STATES ARMY, APPELLANT

---

19 September 1984

Colonel William G. Eckhardt, JAGC, Lieutenant Colonel William P. Heaston, JAGC, Major Edwin D. Selby, JAGC, and Captain Audrey H. Liebross, JAGC, were on the pleadings for appellant.

Colonel James Kucera, JAGC, Lieutenant Colonel Thomas M. Curtis, JAGC, and Captain Samuel J. Rob, JAGC, were on the pleadings for appellee.

Before McKAY, LYMBURNER and COHEN, Appellate Military Judges

MEMORANDUM OPINION ON FURTHER REVIEW

McKay, Senior Judge:

The appellant, Specialist Four Thomas, was tried on 25 October 1982 by a military judge sitting as a general court-martial. He was convicted, in accordance with his pleas, of assault with a means likely to produce grievous bodily harm, simple assault, and possession of a switchblade knife in violation of a regulation, in violation of Articles 128 and 92, Uniform Code of Military Justice, 10 U.S.C. §§ 928 and 892

(1982), respectively. He was sentenced to a dishonorable discharge, confinement at hard labor for 12 months, forfeiture of all pay and allowances, and reduction to the grade of Private E-1. The convening authority approved the sentence. On 22 September 1983, this Court affirmed the findings and the sentence. On 16 January 1984, the United States Court of Military Appeals remanded the case to this Court for consideration of issues concerning alleged unlawful command influence by the Commander, 3d Armored Division, raised for the first time before that Court. In the allegations of error now before this Court, the appellant contends that the illegal actions of the convening authority, Major General Thurmond E. Anderson, pervaded and affected every stage of the proceedings, chilled the appellant's rights to a trial by members and to plead not guilty, disqualified General Anderson from taking action in the appellant's case, and denied the appellant a fair sentencing hearing.

This Court recently considered *en banc* the issue of unlawful command influence in the 3d Armored Division and found that there was evidence of its presence resulting from the conduct of General Anderson. *See United States v. Yslava*, 18 M.J. 670 (ACMR 1984); *United States v. Treakle*, 18 M.J. 646 (ACMR 1984). For the reasons stated in *Treakle*, we find the providency of Specialist Thomas' pleas to be unaffected by the pressures of unlawful command influence. Specialist Thomas, in the presence of several witnesses, assaulted another soldier with a switchblade knife. He was originally charged with attempted murder, but was able to negotiate a pretrial agreement allowing him to plead guilty to a lesser offense. We believe his decision to plead guilty was independent from any concern he may have felt over whether the presence of command influence would affect the outcome of a contested court-martial.

We also find no error regarding the review and action by General Anderson. During the sentencing portion of the trial, however, the appellant's defense counsel called only one witness,[1] and his testimony, which consisted of a description of

[1] This witness was called to counter apparent aggravating material of a second assault placed into evidence by the government, according to a statement made to the trial judge by the trial defense counsel.

the assault, was generally adverse to Specialist Thomas. No testimony was presented regarding the appellant's prior duty performance or his potential for rehabilitation, and the record provides no explanation for the absence of such testimony. In *United States v. Schroeder,* SPCM 18935 (ACMR 14 Aug. 1984), we held that once pervasive unlawful command influence has been shown to have been exerted against potential witnesses, and where the record of trial provides no explanation for the nonappearance of defense witnesses, we will presume that favorable witnesses have been influenced to the prejudice of the accused. That holding is applicable to this case and we will order a rehearing on sentence.

The findings of guilty are affirmed. The sentence is set aside. A rehearing may be ordered by a different convening authority.

Judge LYMNBURNER concurs.

Judge COHEN absent.

FOR THE COURT:

/s/ WILLIAM S. FULTON, JR.
William S. Fulton, Jr.
Clerk of Court

APPENDIX B-3

UNITED STATES ARMY COURT OF MILITARY REVIEW

CM 443527

UNITED STATES, APPELLEE

v.

SPECIALIST FOUR ROGER E. THOMAS, SSN 083-54-1120, UNITED STATES ARMY, APPELLANT

---

2 August 1985

Lieutenant Colonel William P. Heaston, JAGC, Major Edwin D. Selby, JAGC, and Captain Audrey H. Liebross, JAGC, were on the pleadings for appellant.

Colonel James Kucera, JAGC, Lieutenant Colonel Adrian J. Gravelle, JAGC, and Captain Samuel J. Rob, JAGC, were on the pleadings for appellee.

Before McKAY, WATKINS, and LYMBURNER, Appellate Military Judges

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MEMORANDUM OPINION ON FURTHER REVIEW

LYMBURNER, Judge:

This case is before the Court for review pursuant to Article 66, Uniform Code of Military Justice, following the completion of a rehearing on the sentence which was earlier ordered by the Court. *United States v. Thomas*, CM 443527 (ACMR 19 Sep. 1984) (unpub.). The appellant was tried by a general court-martial convened by Major General Thurman E. Anderson, Commander, 3d Armored Division. The findings and sentence were initially approved by this Court on 22 September 1983, but on 16 January 1984 the United States

Court of Military Appeals remanded the case to this Court for consideration of issues concerning the exercise of unlawful command influence by General Anderson. On remand, this Court affirmed the findings, set aside the sentence, and authorized a rehearing on the sentence based upon the holding in *United States v. Schroeder*, 18 M.J. 792 (ACMR 1984), *pet. granted*, 19 M.J. 314 (CMA 1985).

At the sentence rehearing, the appellant moved that the charges against him be dismissed on two grounds; one, on the basis of command influence, and two, because the court lacked jurisdiction. The military judge denied the motions. Stipulations of expected testimony from individuals who, at one time, had been the appellant's platoon leader and squad leader were introduced by the appellant on his behalf. Additionally, the appellant offered favorable evidence regarding his performance while confined and while employed on excess leave.

The appellant now asserts that dismissal of the charges and specifications is the only fair remedy for the command influence of Major General Anderson. We disagee. With respect to the findings in this case, we decided that issue against the appellant upon initial review, and we find nothing in the record to warrant a change in that direction. The sentence rehearing was provided to the appellant for the specific purpose of remedying the effect of command influence upon the appellant's trial. No further relief is warranted.

The decision of this Court, dated 19 September 1984, affirming the findings of guilty, remains in effect. The sentence is affirmed.

Senior Judge McKAY concurs.[1]

Judge WATKINS did not participate in this decision.

FOR THE COURT:

/s/ WILLIAM S. FULTON, JR.
William S. Fulton, Jr.
Clerk of Court

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[1] Senior Judge William P. McKay took final action in this case prior to his reassignment.

APPENDIX C

United States v. Cook

Staff Sergeant Franklin K. Cook, Jr. was referred to a general court-martial on January 24, 1983. He was tried before a military judge alone on February 10, 1983, and was convicted of unauthorized absence, resisting apprehension, escape from custody, possession of hashish, and two bad-check offenses pursuant to his pleas. The adjudged sentence included a bad-conduct discharge and reduction to the grade of E-1. The findings of guilty and sentence were approved by MG Anderson on April 23, 1984.

The bad-conduct discharge was set aside by the Army Court of Military Review on October 31, 1984, based on the finding that unlawful command influence had tainted the sentencing proceedings. Unpublished opinion at 3 (Appendix C-1). Subsequently, the Court of Military Appeals held that the Army court's reduction of the sentence adequately remedied the prejudice suffered by petitioner. *Thomas*, 22 M.J. at 398.

APPENDIX C-1

UNITED STATES ARMY COURT OF MILITARY REVIEW

CM 444195

UNITED STATES, APPELLEE

v.

STAFF SERGEANT FRANKLIN K. COOK, JR., SSN 180-36-0392, UNITED STATES ARMY, APPELLANT

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31 Oct. 1984

Lieutenant Colonel William P. Heaston, JAGC, argued the cause for the appellant. With him on the brief were Major Edwin D. Selby, JAGC, and Captain Gunther O. Carrle, JAGC.

Captain Samuel J. Rob, JAGC, were on the pleadings for appellee. With him on the brief were Colonel James Kucera, JAGC, and Lieutenant Colonel Thomas M. Curtis, JAGC.

Before SU-BROWN, YAWN and WALCZAK, Appellate Military Judges

MEMORANDUM OPINION

Per Curiam:

This case was tried in the 3d Armored Division by a court-martial convened by Major General Anderson. Pursuant to his pleas, appellant, a noncommissioned officer with over 17 years of service, was convicted by a military judge sitting as a general court-martial for being absent without leave, resisting apprehension, escape from custody, possession of marijuana, and two specifications of writing bad checks

totalling over $12,000. The convening authority approved appellant's sentence to a bad-conduct discharge and reduction to Private E-1.

Appellant contends, *inter alia*, that General Anderson engaged in unlawful command influence which tainted the proceedings against him and requests that we set aside the findings and sentence and dismiss the charges and their specifications.

In *United States v. Treakle*, 18 M.J. 646 (ACMR 1984), we discussed the evidence concerning the existence of command influence in the 3d Armored Division during the time General Anderson was in command. We do not reiterate that discussion here. We note that illegal command influence was present in that organization when appellant was tried. The influence extended at least to unlawful pressure, in violation of Article 37, Uniform Code of Military Justice, 10 U.S.C. § 837 (1982), being brought to bear upon prospective character witnesses for accused persons with respect to the content of their testimony. As this Court stated in *Treakle*:

> A finding that unlawful pressure has been brought to bear in violation of Article 37 triggers a rebuttable presumption that the recipient of the unlawful pressure was in fact influenced. (Footnote omitted.) As we construe this presumption of prejudice, the target and the content of the unlawful pressure define the nature and extent of the presumed influence and the resulting prejudice. The presumption may be be rebutted only by clear and positive evidence. (Footnote omitted.)

18 M.J. at 657.

As a consequence of General Anderson's unlawful command influence, we presume appellant was deprived of favorable character witnesses. Once this presumption is raised the Government must rebut it. The Government has not sustained its burden with respect to the sentencing portion of appellant's trial. In this case, the evidence shows that appellant's offenses were alcohol related. He testified during the sentencing portion of his trial that he voluntarily referred himself to the alcohol rehabilitation program when he realized the seriousness of his drinking problem. Since he was

able to maintain his military appearance and do his work, appellant said he had a hard time convincing his command that he really had a problem. Appellant testified the command's failure to understand his problem frustrated him and led to his absence without leave. Appellant maintained that he continued to abstain from alcohol during his absence from duty, but he substituted writing bad checks for drinking. Appellant testified that, since being in pretrial confinement, he has come to accept his guilt and wants to stay in the Army and help others. A noncommissioned officer acquaintance of appellant's testified that appellant had helped him with his drinking problem and involved him in Alcoholics Anonymous. Two social workers involved in appellant's alcohol treatment and rehabilitation also testified on appellant's behalf. These individuals testified appellant was a good candidate for successful rehabilitation and retention in the Army.

After announcing sentence, the military judge recommended that the convening authority suspend the entire sentence. He discussed, at great length, appellant's potential for further service and suggested that the convening authority, General Anderson, personally speak with appellant.

We note that no one from appellant's chain of command testified during sentencing. In this case such testimony might have had a significant effect on the sentence adjudged by the military judge. The record provides no explanation for the lack of testimony by appellant's chain of command. The issue of command influence was not litigated at trial, and the record does not reflect that appellant knew about General Anderson's activities. Under these circumstances, the presumption that appellant was deprived of favorable character witnesses remains unrebutted. Accordingly, the sentence cannot be affirmed. *United States v. Schroeder*, 18 M.J. 792 (ACMR 1984). Since the unlawful influence involved in this case was directed primarily toward discouraging testimony that encouraged retention of a soldier within the Army, we believe the prejudice suffered by appellant can be adequately remedied by reassessing his sentence not to include a discharge. *United States v. Hill*, 18 M.J. 757 (ACMR 1984).

Although the nature of some of the offenses in this case would have allowed favorable character testimony to have been admitted during a trial on the merits, we find, under the facts of this case, appellant's pleas were provident and the findings should not be disturbed. *See United States v. Treakle*, 18 M.J. at 657-58.

The findings of guilty are affirmed. Only so much of the sentence as provides for reduction to the grade of Private E-1 is affirmed.

FOR THE COURT:

/s/ WILLIAM S. FULTON, JR.
William S. Fulton, Jr.
Clerk of Court

APPENDIX D

United States v. Giarratano

Specialist Five Donald J. Giarratano's case was referred to a special court-martial empowered to adjudge a bad-conduct discharge on July 26, 1983. The command-influence issue was litigated at trial and the military judge determined that because of the existence of unlawful command influence in the Third Armored Division remedial actions were required. The granted remedies included: (1) if petitioner elected trial by members, the judge would sustain any defense challenge for cause against a panel member who was a member of a Third Armored Division unit; (2) no character evidence would be received which was not favorable to the petitioner; and (3) MG Anderson was disqualified from taking action on the case after trial. *Thomas,*, 22 M.J. at 398-399.

Petitioner subsequently elected to be tried by judge alone and, contrary to his pleas, was found guilty of distributing hashish. The adjudged sentence to a bad-conduct discharge, confinement for three months, forfeiture of $100.00 pay per month for three months, and reduction to the grade of E-1 was approved by another convening authority on April 12, 1984. The Army court affirmed the findings and sentence in an unpublished opinion, SPCM 20588 (A.C.M.R. 18 Mar. 1985) (Appendix D-1). On April 12, 1985, on its own motion, the Army court reconsidered the case for the purpose of reissuing its previous memorandum decision as a published opinion reported at 20 M.J. 553 (A.C.M.R. 1985) (Appendix D-2), The Court of Military Appeals affirmed the Army court's decision. *Thomas*, 22 M.J. at 398-399.

APPENDIX D-1

UNITED STATES ARMY COURT OF
MILITARY REVIEW

SPCM 20588

UNITED STATES, APPELLEE

v.

SPECIALIST FIVE DONALD J. GIARRATANO,
478-78-8737,
UNITED STATES ARMY, APPELLANT

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18 March 1985

Colonel William G. Eckhardt, JAGC, Lieutenant Colonel William P. Heaston, JAGC, Captain Harry L. Williams, Jr., JAGC, and Captain Craig E. Teller, JAGC, were on the pleadings for appellant.

Colonel James Kucera, JAGC, Lieutenant Colonel Thomas M. Curtis, JAGC, and Captain Samuel J. Rob, JAGC, were on the pleadings for appellee.

Before McKAY, LYMBURNER, and WALCZAK, Appellate Military Judges

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MEMORANDUM OPINION

McKAY, Senior Judge:

The appellant was tried by a special court-martial without members during the period October-November-December 1983, and convened by Major General Thurman E. Anderson, Commander, 3d Armored Division. Contrary to his plea Specialist Giarratano was convicted of wrongfully distributing marijuana in the hashish form. The adjudged sentence extended to reduction to the grade of E-1, forfeiture of $100.00 pay per month for three months, confinement at hard labor for three months, and a bad-conduct discharge.

After completion of the trial the case was transferred to Lieutenant General Bruen, Commander, 21st Support Command, who took initial action and approved the adjudged sentence.

During the trial the appellant raised the issue of unlawful command influence by General Anderson. As appropriate relief he asked that a new referral be accomplished by a different convening authority, that members be selected from outside the 3d Armored Division, and review by a convening authority outside the 3d Armored Division. At the resulting evidentiary hearing many witnesses appeared, including General Anderson, and a great amount of testimony, covering some 1400 pages, was taken.

After receiving and considering the extensively developed evidence on the appellant's motion, the military judge made special findings to include: (1) That Major General Anderson was empowered to convene this case. (2) That General Anderson's oral comments and the oral comments and writings of certain of his subordinates constituted unlawful command influence. (3) That the appellant's chain of command was not affected in this case by unlawful command influence. The trial judge nevertheless provided several remedies as relief to the appellant in order to ensure him a fair trial. Among the remedies provided were: (1) The assurance that a challenge for cause would be sustained against any member assigned to the 3d Armored Division prior to 4 March 1983. (2) That no unfavorable character evidence would be received against the appellant. (3) The military judge found General Anderson disqualified as reviewing authority.[1]

On appeal before this Court, Specialist Giarratano asserts only that Major General Anderson was disqualified as a matter of law from referring his case to trial. We disagree. *United States v. Treakle*, 18 M.J. 646 (ACMR 1984) (en banc).

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[1] The military judge acknowledged he was powerless to take action to require referral to another convening authority. The case of course was in fact transferred to a different convening authority by General Anderson.

The Court has examined the issue of unlawful command influence in the 3d Armored Division in numerous cases and has determined it to have been present in the division during the time it was commanded by General Anderson. See *United States v. Mitchell*, SPCM 18953 (ACMR 31 Jan. 1985); *United States v. Abelon*, 19 M.J. 767 (ACMR 1984); *United States v. Treakle, supra; United States v. Yslava*, 18 M.J. 670 (ACMR 1984) (en banc), *pet. granted*, 19 M.J. 281 (CMA 1985). As a result of our inquiry into this unfortunate episode we have found that General Anderson's conduct has affected court members, *United States v. Mitchell, supra*, witnesses, *United States v. Hill*, 18 M.J. 757 (ACMR 1984), and in the absence of an explanation in the record for the absence of defense witnesses that there was a presumption that an accused was deprived of character witnesses. *United States v. Abelon, supra; United States v. Schroeder*, 18 M.J. 792 (ACMR 1984). Relief usually was provided in the form of an order for an evidentiary hearing of a type specified by the Court of Military Appeals in the case of *United States v. Dubay*, 37 C.M.R. 411 (CMA 1967). We find no requirement for that type relief in this case.

We are satisfied that the litigation of the appellant's motions for appropriate relief at an Article 39a, Uniform Code of Military Justice, 10 U.S.C. § 839a (1982), session satisfied the fact finding procedures required when the issue of unlawful command influence is raised. See *United States v. Karlson*, 16 M.J. 469 (CMA 1983); *United States v. Alexander*, 19 M.J. 614 (ACMR 1984). The appellant in this case had the opportunity to present evidence and to cross-examine government witnesses. The appellant's chain of command testified, and neither at his trial or in this appeal does he claim that General Anderson's conduct resulted in a denial to him of favorable witnesses. Also, as we have indicated, certain relief was provided the appellant by the military judge.[2]

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[2] We feel it appropriate at this time to commend the military trial judge for the outstanding professional manner in which he conducted the trial of this case.

Considering these circumstances, and after our own review of the record, we find that it has been established by clear and convincing evidence that this case was not adversely affected by General Anderson's unlawful conduct. Finally, we find that the government proved the appellant's guilt beyond reasonable doubt.

The findings of guilty and the sentence are affirmed.

Judge LYMBURNER and Judge WALCZAK concur.

FOR THE COURT:

/s/ WILLIAM S. FULTON, JR.
William S. Fulton, Jr.
Clerk of Court

APPENDIX D-2

UNITED STATES ARMY COURT OF MILITARY REVIEW

SPCM 20588

UNITED STATES, APPELLEE

v.

SPECIALIST FIVE DONALD J. GIARRATANO,
478-78-8737,
UNITED STATES ARMY, APPELLANT

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12 April 1985

Colonel William G. Eckhardt, JAGC, Lieutenant Colonel William P. Heaston, JAGC, Captain Harry L. Williams, Jr., JAGC, and Captain Craig E. Teller, JAGC, were on the pleadings for appellant.

Colonel James Kucera, JAGC, Lieutenant Colonel Thomas M. Curtis, JAGC, and Captain Samuel J. Rob, JAGC, were on the pleadings for appellee.

Before McKAY, LYMBURNER, and WALCZAK, Appellate Military Judges

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OPINION OF THE COURT ON RECONSIDERATION[1]

McKAY, Senior Judge:

The appellant was tried by a special court-martial without members during the period October-November-December 1983. The court-martial was convened by Major General Thurman E. Anderson, Commander, 3d Armored Division. Contrary to his plea Specialist Giarratano was convicted of

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[1] The Court reconsidered this case on its own motion under Rule 20 of its Rules of Practice and Procedure for the purpose of reissuing its previous memorandum decision in this Opinion of the Court.

wrongfully distributing marijuana in the hashish form. The sentence extended to reduction to the grade of E-1, forfeiture of $100.00 pay per month for three months, confinement at hard labor for three months, and a bad-conduct discharge. After completion of the trial the case was transferred to Lieutenant General John D. Bruen, Commander, 21st Support Command, who took initial action and approved the adjudged sentence.

I

During the trial the appellant raised the issue of unlawful command influence by General Anderson. As appropriate relief he asked that a new referral be accomplished by a different convening authority, that court members be selected from outside the 3d Armored Division, and that the review be conducted by a convening authority outside the 3d Armored Division. At the resulting evidentiary hearings many witnesses appeared,[2] including General Anderson, and a great amount of testimony, covering some 1400 pages, was taken.[3]

After receiving and considering the extensively developed evidence on the appellant's motion, the military judge made special findings to include: (1) Major General Anderson was empowered to convene this case.[4] (2) General Anderson's oral comments and the oral comments and writings of certain of his subordinates constituted unlawful command influence. (3) The appellant's company commander, battalion commander and brigade commander, respectively, never attended any meetings at which General Anderson addressed testifying at

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[2] From the record it appears that the appellant was allowed to call any witness with relevant information.

[3] The record of trial in this case was admitted as an appellate exhibit in pleadings before this Court in most, if not all, of the 3d Armored Division cases cited in this opinion, as well as in most other cases before this Court that involved the issue of unlawful command influence in the 3d Armored Division while General Anderson was Commander.

[4] The appellant was assigned to a non-3d Armored Division unit that was attached to the division for purposes which included court-martial jurisdiction.

courts-martial, or the preferral or referral of court-martial charges. (4) None of the appellant's commanders had any communication with General Anderson regarding charges pending against the appellant, that each of them submitted his own independent recommendations for referral of the charges to trial, and that none indicated any fear of adverse consequences or any reluctance to testify at the appellant's trial. (5) The appellant's chain of command was not affected in this case by unlawful command influence. The military judge nevertheless provided several remedies as relief to the appellant in order to assure him a fair trial. Among the remedies provided were: (1) The appellant was assured that a challenge for cause would be sustained against any member assigned to the 3d Armored Division prior to 4 March 1983.[5] (2) No unfavorable character evidence would be received against the appellant. (3) The military judge found General Anderson disqualified as reviewing authority.[6] After these rulings the appellant elected a bench trial.

On appeal before this Court, Specialist Giarratano asserts only that Major General Anderson was disqualified as a matter of law from referring his case to trial. We disagree, as the Court had decided this issue against the appellant in *United States v. Treakle*, 18 M.J. 646 (ACMR 1984) (en banc).

II

General Anderson's conduct involved issues other than his competence to refer cases to trial. These issues have also been considered in our disposition of this case.

Over the past few months this Court has examined the issue of unlawful command influence in the 3d Armored Division in numerous cases and has determined it to have been

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[5] On this date General Anderson took initial remedial action to counteract the effects of his conduct later found to have been unlawful command influence.

[6] The military judge acknowledged he was powerless to take action to require referral to another convening authority. General Anderson did in fact transfer the case to a different convening authority for review and initial action.

present in the division during the time it was commanded by General Anderson.[7] *See United States v. Mitchell*, 19 M.J. 905 (ACMR 1985); *United States v. Abelon*, 19 M.J. 767 (ACMR 1984); *United States v. Treakle, supra; United States v. Yslava*, 18 M.J. 670 (ACMR 1984) (en banc), *pet. granted*, 19 M.J. 281 (CMA 1985). As a result of the Court's inquiry into this unfortunate episode we have found that General Anderson's conduct has adversely affected court members, *United States v. Mitchell, supra,* and witnesses, *United States v. Hill*, 18 M.J. 757 (ACMR 1984). We have also found that because of pervasive unlawful command influence in the 3d Armored Division there was a presumption that an accused was deprived of character witnesses when none appeared and there was no explanation for the absence. *United States v. Abelon, supra; United States v. Schroeder*, 18 M.J. 792 (ACMR 1984). We have also questioned General Anderson's ability to perform the post-trial functions of a convening authority. *United States v. Glidewell*, 19 M.J. 797 (ACMR 1985); *United States v. Thompson*, 19 M.J. 690 (ACMR 1984). Relief usually was provided in the form of an order for an evidentiary hearing of a type specified by the Court of Military Appeals in the case of *United States v. Dubay*, 37 C.M.R. 411 (CMA 1967). We find no requirement for that type relief in this case.

We are satisfied that the litigation of the appellant's motion for appropriate relief at an Article 39(a), Uniform Code of Military Justice, 10 U.S.C. § 839(a) (1982), session, accomplished the fact finding procedures required when the issue of unlawful command influence is raised. *See United States v. Karlson*, 16 M.J. 469 (CMA 1983); *United States v. Alexander*, 19 M.J. 614 (ACMR 1984). The government, after appellant raised the issue of unlawful command control, met its burden of going forward with clear and convincing evidence that the referral process was not tainted by unlawful command control. *See United States v. Rosser*, 6 M.J. 267, 272 (CMA 1979). The government called as wit-

[7] See United States v. Treakle, 18 M.J. 646 (ACMR 1984) (en banc) for a discussion of the facts surrounding this issue.

nesses, Major General Anderson, his former staff judge advocate, eight battalion commanders, four first sergeants, and other commissioned and noncommissioned officers who were assigned to units under General Anderson's general court-martial jurisdiction. The appellant also had the opportunity to present evidence and to cross-examine government witnesses. Our review of the record convinces us the military judge correctly found the appellant's chain of command was free of any adverse influence from unlawful command conduct. Further, neither at his trial nor in this appeal does Specialist Giarratano claim that General Anderson's conduct resulted in a denial to him of favorable witnesses. Also, as we have indicated, certain relief was provided the appellant by the military judge.[8] Considering these circumstances, the findings of the military judge, and our own review of the record, we find that it had been established by clear and convincing evidence that this case was not adversely affected by General Anderson's unlawful conduct. Finally, we find that the government proved the appellant's guilt beyond reasonable doubt.

The findings of guilty and the sentence are affirmed.

Judge LYMBURNER and Judge WALCZAK concur.

FOR THE COURT:

/s/ WILLIAM S. FULTON, JR.

William S. Fulton, Jr.
Clerk of Court

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[8] We feel it appropriate at this time to commend the military judge for the outstandingly skillful manner in which he conducted the trial of this case.

APPENDIX E

United States v. Ivy

Private First Class Jack N. Ivy was referred to a general court-martial on November 11, 1983, and was tried on December 2, 1983 by military judge alone. Pursuant to mixed pleas, he was convicted of two charges of signing a false official record, damaging government property, breaking restriction, and opening and secreting mail matter. He was sentenced to a dishonorable discharge, confinement for five years, total forfeitures, and reduction to Private E-1. Confinement in excess of three years was suspended for two years by the convening authority pursuant to a pretrial agreement.

In an unpublished opinion, CM 445777 (A.C.M.R. 29 Jul. 1985) (Appendix E-1), the Army Court of Military Review held that, with respect to the charges to which petitioner pled guilty, the military judge did not err by denying petitioner's motion to dismiss the charges based on the contention that he was denied a fair trial as a result of the existence of command influence. However, the Army court found that unlawful command influence tainted the one charge to which petitioner pled not guilty and, accordingly, set aside the findings of guilty thereto. The remaining findings of guilty and sentence were affirmed. This decision was subsequently affirmed by the Court of Military Appeals on September 23, 1986 (Appendix E-2).

APPENDIX E-1

UNITED STATES ARMY COURT OF
MILITARY REVIEW

CM 445777

UNITED STATES, APPELLEE

v.

Private First Class JACK N. IVY, 526-75-3428,
UNITED STATES ARMY, APPELLANT

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29 July 1985

Lieutenant Colonel Arthur L. Hunt, JAGC, Captain Thomas J. Feeney, JAGC, and Captain Bernard P. Ingold, JAGC, were on the pleadings for appellant.

Colonel James Kucera, JAGC, Lieutenant Colonel Adrian J. Gravelle, JAGC, Captain Samuel J. Rob, JAGC, and Captain Erik M. Stumpfel, JAGC, were on the pleadings for appellee.

Before McKAY, WATKINS, and LYMBURNER, Appellate Military Judges

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MEMORANDUM OPINION

McKAY, Senior Judge:

The appellant was tried on 2 December 1983 by a military judge sitting as a general court-martial convened by the Commander, 3d Armored Division, Major General Thurman E. Anderson. Pursuant to his pleas, the appellant was convicted of signing a false official record (two specifications), damaging government property, and breaking restriction, in violation of Articles 107, 108, and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 907, 908, and 934 (1982) [hereinafter cited as UCMJ]. Contrary to his pleas, the appellant was also convicted of opening and secreting mail matter in violation of

Article 134, UCMJ. He was sentenced by the military judge to a dishonorable discharge, confinement at hard labor for five years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. The Commander, VII Corps, Lieutenant General Galvin, acting pursuant to a pretrial agreement, approved the sentence but suspended for two years execution of that portion providing for confinement at hard labor in excess of three years.

The appellant contends that General Anderson's attempts to deny accused soldiers favorable evidence and to insure they were convicted and received heavy sentences denied the appellant a fair trial.[1] The issue of whether the existence of unlawful command influence worked to deny the appellant a fair trial was litigated at trial in the form of a motion to dismiss the charges. In support of its position that the appellant was not prejudiced by the remarks of General Anderson or his subordinates, the government called three noncommissioned officer members of the appellant's chain of command. In general, each testified that he was aware of the purported policy within the 3d Armored Division against testifying for accused soldiers, but that he felt the policy to be wrong and would not be influenced not to present favorable evidence for the appellant. Each witness also testified regarding the appellant's duty performance, presenting a generally balanced picture of the appellant's favorable and unfavorable characteristics. None of the three noncommissioned officers appeared for the appellant during the sentencing portion of the trial.

With regard to the charges to which the appellant pleaded guilty and the sentence, we are satisfied that the litigation of the appellant's motion to dismiss the charges because of unlawful command influence satisfied the fact-finding procedures required when the issue of unlawful command influence is raised. *See United States v. Serrano*, 19 M.J. 969, *pet. denied*, No. 52222/AR (CMA 9 July 1985). Regarding the

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[1] For discussion of the facts behind this issue, *see, e.g.*, United States v. Giarratano, 20 M.J. 553 (ACMR 1985); United States v. Mitchell, 19 M.J. 905 (ACMR 1985); United States v. Treakle, 18 M.J. 646 (ACMR 1984), *pet. granted*, 20 M.J. 131 (CMA 1985).

charge and specification to which the appellant pleaded not guilty, however, we are not similarly satisfied. The government's evidence on the motion to dismiss extended only to the issue of whether members of the appellant's chain of command would be reluctant to testify as to the appellant's character and duty performance. This Court, however, has found that General Anderson's comments and activities disparaged the giving of any testimony inconsistent with a finding of guilty. *United States v. Mitchell*, 19 M.J. 905 (ACMR 1985). The litigation of the appellant's motion did not resolve whether the appellant was prejudiced in this regard. Although an adversary procedure would normally be the appropriate means for resolving this issue, *United States v. Karlson*, 16 M.J. 469 (CMA 1983), we will instead, for reasons of judicial economy, set aside the findings of guilty of the additional Charge and its Specification and dismiss the Additional Charge.

The appellant also contends that Specification 1 of Charge I fails to state an offense and that his plea of guilty to Specification 2 of Charge I is improvident. We find Specification 1 of Charge I contains, at least by implication, the elements of the offense intended to be charged, that it sufficiently apprised the appellant of what he had to be prepared to meet,[2] and that it protected him against future prosecution for the same offense. The specification is therefore legally adequate. *See United States v. Sells*, 11 C.M.R. 202 (CMA 1953); *see also United States v. Cox*, 18 M.J. 72 (CMA 1984); *United States v. Schwartz*, 15 M.J. 109 (CMA 1983).

Regarding Specification 2 of Charge I, the appellant contends that his responses during the providence inquiry raised the question, which the military judge failed to resolve, of whether he could avail himself of the "exculpatory no" defense to the charge of making a false official statement. Considering the circumstances surrounding the appellant's false statement, we do not believe that this defense is available with violations of Article 107, UCMJ. *See generally*

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[2] The appellant pleaded guilty to the Specification and the Charge and raised no complaint at trial regarding the specification's sufficiency.

United States v. Davenport, 9 M.J. 364, 370 (CMA 1980); *United States v. Harrison*, SPCM 20995, slip op. at 3, n.2 (ACMR 14 June 1985).

The findings of guilty of the Additional Charge and its Specification are set aside and the Additional Charge and its Specification are dismissed. The remaining findings of guilty are affirmed. Reassessing the sentence on the basis of the error noted and the entire record, the Court affirms the sentence.

Judge LYMBURNER concurs.

Judge WATKINS did not participate in this decision.

FOR THE COURT:

/s/ WILLIAM S. FULTON, JR.

William S. Fulton, Jr.
Clerk of Court

APPENDIX E-2

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 53344/AR
CMR Dkt. No. 445777

UNITED STATES, APPELLEE

v.

JACK N. IVY (526-75-3428), APPELLANT

ORDER

On further consideration of the granted issue (21 M.J. 395) in light of *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986), we conclude that unlawful command influence within the Third Armored Division did not prejudice appellant at any stage of the judicial process. We base this conclusion on appellant's pleas of guilty and trial before a military judge alone; the fact that character witnesses testified in his behalf at the sentencing stage of the trial; and the action taken by a different convening authority. Accordingly, it is by the Court this 23rd day of September, 1986,

ORDERED:

That the decision of the United States Army Court of Military Review is affirmed.

FOR THE COURT:

/s/ JOHN A. CUTTS, III

John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (LEE)
Appellate Government Counsel (STUMPFEL)

APPENDIX F

United States v. Smith

Charges against Private First Class Mikey R. Smith for drug-related offenses were referred to a general court-martial on December 2, 1983. At a bench trial held on February 3, 1984, pursuant to his pleas, petitioner was convicted of all charges and sentenced to a bad-conduct discharge, confinement for two years and nine months, total forfeitures, and reduction to Private E-1. In accordance with a pretrial agreement, the convening authority limited the term of confinement to 18 months but otherwise approved the sentence.

Determining that the petitioner suffered no prejudice from the existence of unlawful command influence, the Army Court of Military Review affirmed the findings and sentence in an unpublished opinion, CM 445520 (A.C.M.R. 13 Dec. 1984) (Appendix F-1). The Court of Military Appeals affirmed the Army court's decision on September 26, 1986 (Appendix F-2).

APPENDIX F-1

UNITED STATES ARMY COURT OF
MILITARY REVIEW

CM 445520

UNITED STATES, APPELLEE

v.

PRIVATE FIRST CLASS MIKEY R. SMITH, 326-64-4886,
UNITED STATES ARMY, APPELLANT

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13 December 1984

Lieutenant Colonel Paul J. Luedtke, JAGC, and Lieutenant Colonel Arthur L. Hunt, JAGC, were on the pleadings for appellant.

Colonel James Kucera, JAGC, Lieutenant Colonel Thomas M. Curtis, JAGC, and Captain Samuel J. Rob, JAGC, were on the pleadings for appellee.

Before SUTER, RABY, and COHEN, Appellate Military Judges

MEMORANDUM OPINION

SUTER, Chief Judge:

On 3 February 1984, in a trial before a military judge sitting as a general court-martial, the appellant was convicted pursuant to his pleas[1] of two specifications alleging possession and distribution of a controlled substance and of one

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[1] The appellant's guilty plea was entered pursuant to a pretrial agreement wherein the convening authority agreed to approve no punishment in excess of a dishonorable discharge, confinement at hard labor for 18 months, forfeiture of all pay and allowances, and reduction to the grade of Private (E-1).

specification alleging possession with intent to distribute a controlled substance, in violation of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934 (1982). He was sentenced to confinement at hard labor for two years and nine months, forfeiture of all pay and allowances, reduction to the grade of Private (E-1), and a bad-conduct discharge. The convening authority, Major General (MG) Richard G. Graves, approved the sentence except for the confinement at hard labor, which he limited to 18 months.

Before this Court, the appellant asserts that he was denied a fair sentencing proceeding as a result of the unlawful command influence, or the perception thereof, exercised by MG Thurman E. Anderson, the convening authority that referred the case to trial. The appellant does not allege that his pleas were improvident or that referral of his case to trial by general court-martial was improper. The issue of unlawful command influence in the 3d Armored Division has recently been considered by this Court. *See, e.g., United States v. Yslava*, 18 M.J. 670 (ACMR 1984) (en banc); *United States v. Treakle*, 18 M.J. 646 (ACMR 1984) (en banc).

This Court acknowledged in *United States v. Treakle, supra*, that there was evidence of unlawful command influence in MG Anderson's command and that certain comments by him may have been understood by members of his command to discourage favorable character testimony. In the instant case, however, the appellant informed the trial court through counsel that he was aware both of MG Anderson's activities and of the litigation arising therefrom, and that he nonetheless did not want this matter raised at trial "for ta[c]tical and strategic purposes." While defense counsel's averment of no prejudice does not constitute waiver of the command control issue, *United States v. Blaylock*, 15 M.J. 190 (CMA 1983); *United States v. Hawthorne*, 22 CMR 83, 89 (CMA 1956), his factual statement to the trial court that the appellant specifically knew of MG Anderson's actions and nonetheless did not wish the matter raised at trial is entitled to great weight regarding the question of prejudice.

In light of the appellant's election to be tried by a military judge alone (eliminating the possibility that his sentence may

have been unduly harsh because court-members were influenced by MG Anderson's remarks), the seriousness of the charges to which the appellant pled guilty, the maximum possible punishment which included confinement at hard labor for 30 years, and the substantial reduction in the appellant's sentence to confinement effected by the terms of his pretrial agreement, we are convinced that the appellant suffered no prejudice as to sentence. *United States v. Yslava*, 18 M.J. at 673.

The findings of guilty and the sentence are affirmed.

Judge COHEN concurs.

Senior Judge RABY did not participate in this decision.

FOR THE COURT:

/s/ WILLIAM S. FULTON, JR.

William S. Fulton, Jr.
Clerk of Court

APPENDIX F-2

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 51736/AR
CMR Dkt. No. 445520

UNITED STATES, APPELLEE

v.

MIKEY R. SMITH (326-64-4886), APPELLANT

ORDER

On further consideration of the granted issues (20 M.J. 193) in light of *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986), we conclude that command influence did not affect appellant's trial at any stage of the proceedings. We base this conclusion on appellant's pleas of guilty and trial before a military judge alone; the statement by trial defense counsel that he did not wish to raise the issue of command influence at trial; and the action taken by the new commander of the Third Armored Division. Accordingly, it is by the Court this 26th day of September, 1986,

ORDERED:

That the decision of the United States Army Court of Military Review is affirmed.

FOR THE COURT:

/s/ JOHN A. CUTTS, III

John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (LEE)
Appellate Government Counsel (ROB)

APPENDIX G

United States v. Thompson

Private First Class Mark A. Thompson's case was referred to a general court-martial on November 4, 1983. In accordance with his pleas, he was convicted at a bench trial, on September 30, 1983, of rape. The military judge sentenced him to a dishonorable discharge, confinement for eight years, total forfeitures, and reduction to Private E-1. Pursuant to a pretrial agreement, the convening authority approved the sentence but suspended for one year that portion of the confinement exceeding five years.

In an unpublished opinion, CM 445365 (A.C.M.R. 9 Jan. 1985) (Appendix G-1), the Army Court of Military Review ordered a sentence rehearing based on a finding of unlawful command influence affecting the sentencing proceedings. At the rehearing held on February 12, 1985, petitioner was sentenced to a dishonorable discharge, confinement for four years, total forfeitures, and reduction to Private E-1. The convening authority reduced the term of confinement to three years, but otherwise approved the sentence. The Army court affirmed the sentence on August 20, 1985, in an unpublished opinion (Appendix G-2). This decision was affirmed by the Court of Military Appeals in a summary order dated September 23, 1986 (Appendix G-3).

APPENDIX G-1

UNITED STATES ARMY COURT OF MILITARY REVIEW

CM 445365

UNITED STATES, APPELLEE

v.

PRIVATE FIRST CLASS MARK A. THOMPSON, 047-64-5089, UNITED STATES ARMY, APPELLANT

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9 JAN 1985

Lieutenant Colonel Paul J. Luedtke, JAGC, Major Robert M. Ott, JAGC, Captain L. Sue Hayn, JAGC, Captain Barry Rothman, JAGC, Captain Robert S. Johnson, Jr., JAGC, and Captain Harry L. Williams, Jr., JAGC, were on the pleadings for appellant.

Colonel James Kucera, JAGC, Lieutenant Colonel Thomas M. Curtis, JAGC, Captain Samuel J. Rob, JAGC, and Captain Richard G. Mann, Jr., JAGC, were on the pleadings for appellee.

Before MARDEN, PAULEY, and WERNER, Appellate Military Judges

MEMORANDUM OPINION

Per Curiam:

In accordance with his pleas, appellant was convicted at a bench trial held on 30 September 1983 of rape in violation of Article 120, Uniform Code of Military Justice. The military judge sentenced him to a dishonorable discharge, confinement at hard labor for eight years, total forfeitures and

reduction to Private E-1. Pursuant to a pretrial agreement, the convening authority approved the sentence but suspended for one year that portion of the confinement in excess of five years.

Within the general framework of appellant's allegation of unlawful command influence on the part of the convening authority, Major General Thurman E. Anderson, are four specific issues: (1) Whether the convening authority was disqualified from referring to trial either any case because of injudiciousness or this case because of personal bias or interest; (2) Whether appellant's pleas of guilty were improvident because the convening authority's actions had the effect of denying appellant favorable character witnesses on the merits; (3) Whether appellant's sentence was tainted because the convening authority's actions had the effect of denying appellant favorable character witnesses on sentencing; (4) Whether the convening authority was disqualified from reviewing and acting on the case because of an inelastic predisposition to approve punitive discharges. Under the circumstances of this case, only the third of these issues warrants resolution in appellant's favor.

For the reasons set forth by this Court in *United States v. Treakle*, 18 M.J. 646, 654 (ACMR 1984) (en banc), we hold that the convening authority was not disqualified from referring this case to trial.

We also hold that the appellant's pleas were provident. Asssuming, as we did in *Treakle, supra*, that unlawful command influence deprived appellant of favorable character witnesses, we perceive no reasonable possibility that the availability or nonavailability of any such witnesses impacted upon appellant's decision to plead guilty. Upon examination of the plea inquiry and the detailed stipulation of fact employed by the judge during the conduct of the inquiry, we are satisfied that appellant's decision to plead guilty was motivated by the terms of his pretrial agreement, the strength of the Government's case and the inherent mitigating value of appellant's plea. *See United States v. Treakle, supra* at 657-58; *United States v. Schroeder*, 18 M.J. 792, 793 (ACMR 1984).

Conversely, we are not convinced that the adjudged sentence was unaffected by unlawful command influence. In determining this issue, each case must be resolved on the basis of circumstances peculiar to it. In *United States v. Schroeder, supra*, a case wherein the appellant pled guilty but no witnesses testified for him during presentencing, we held that:

> It would be easy to speculate that with Schroeder's past record of involvement with marijuana there were simply no officers or noncommissioned officers to be found who would testify favorably on his behalf, or even if such witnesses were available and they gave favorable testimony the sentence would have been unaffected. We will not, however, engage in such speculation. . . .
>
> [W]here, . . . pervasive unlawful influence of witnesses has been established, and there is no evidence or explanation in the record for the failure of defense witnesses to appear, we will presume that favorable witnesses have been influenced to the prejudice of the appellant. . . .

Id. at 794-95.

The facts of the instant case are indistinguishable from those of *Schroeder* as the only evidence in mitigation and extenuation was the appellant's own unsworn statement. We are therefore constrained to set aside the sentence.

The remaining issue concerning the convening authority's disqualification to review and act on the case is moot.

The findings of guilty are affirmed. The sentence is set aside. A rehearing on the sentence may be ordered by a different convening authority.

Senior Judge MARDEN did not participate in the decision of this case.

FOR THE COURT:

/s/ WILLIAM S. FULTON, JR.
William S. Fulton, Jr.
Clerk of Court

APPENDIX G-2

CORRECTED COPY

UNITED STATES ARMY COURT OF
MILITARY REVIEW

CM 445365

UNITED STATES, APPELLEE

v.

PRIVATE FIRST CLASS MARK A. THOMPSON, 047-64-5089,
UNITED STATES ARMY, APPELLANT

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20 August 1985

For Appellant: Lieutenant Colonel William P. Heaston, JAGC, Captain Harry L. Williams, Jr., JAGC (on brief).

For Appellee: Colonel James Kucera, JAGC, Lieutenant Colonel Adrian J. Gravelle, JAGC, Captain Denise A. G. Erickson, JAGC, Captain Richard G. Mann, Jr., JAGC (on brief).

Before MARDEN, PAULEY, and De GIULIO, Appellate Military Judges

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DECISION ON FURTHER REVIEW*

Per Curiam:

This case is before the court for further review pursuant to Article 66 of the Uniform Code of Military Justice, 10 U.S.C. § 866 (Supp. I 1983) following completion of a rehearing on the sentence as previously ordered by the court. *United States v. Thompson*, CM 445365 (ACMR 9 Jan. 1985) (unpub.).

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* "Corrected"

Our decision of 9 January 1985 affirmed the findings of guilty. Accordingly, the sentence is affirmed.

Senior Judge MARDEN took no part in the decision of this case.

FOR THE COURT:

/s/ WILLIAM S. FULTON, JR.

William S. Fulton, Jr.
Clerk of Court

APPENDIX G-3

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 53420/AR
CMR Dkt. No. 445365

UNITED STATES, APPELLEE

v.

MARK A. THOMPSON (047-64-5089), APPELLANT

ORDER

On further consideration of the granted issue (21 M.J. 294) in light of *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986), we conclude that command influence within the Third Armored Division did not prejudice appellant at any stage of the judicial process. We base this conclusion on appellant's pleas of guilty and the sentence rehearing conducted pursuant to the Court of Military Review. Accordingly, it is by the Court this 23rd day of September, 1986,

ORDERED:

That the decision of the United States Army Court of Military Review is affirmed.

For The Court:

/s/ JOHN A. CUTTS, III

John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (LEE)
Appellate Government Counsel (MANN)

APPENDIX H

United States v. Defibaugh

Staff Sergeant Larry C. Defibaugh was referred to a general court-martial on July 20, 1983. He was tried before a court-martial composed of officer and enlisted members on 10 August 1983, and was convicted of carnal knowledge and two specifications of indecent, lewd and lascivious acts pursuant to his pleas. The adjudged sentence included a dishonorable discharge, confinement for five years, forfeiture of all pay and allowances, and reduction to the rank of Private E-1. The findings of guilty and sentence were approved by MG Anderson on November 11, 1983.

On March 27, 1985, the Army Court of Military Review ordered a limited fact-finding hearing to resolve the issue of illegal command influence (Appendix H-1). At that rehearing the military judge found that MG Anderson was disqualified from taking action in the case, and ordered a new review and action. On November 18, 1985, a different convening authority approved the findings and sentence.

On further review the Army court affirmed the findings and sentence in an unpublished opinion, CM 445012 (A.C.M.R. 15 Apr. 1986) (Appendix H-2). Subsequently, the Court of Military Appeals consolidated the two specifications of indecent, lewd and lascivious acts and held that the new review and action adequately remedied the prejudice suffered by petitioner in an order dated October 10, 1986 (Appendix H-3).

APPENDIX H-1

UNITED STATES ARMY COURT OF MILITARY REVIEW

CM 445012

UNITED STATES, APPELLEE

v.

STAFF SERGEANT LARRY C. DEFIBAUGH,, 230-64-5945, UNITED STATES ARMY, APPELLANT

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27 March 1985

Captain Peter D. P. Vint, JAGC, argued the cause for the appellant. With him on the brief were Colonel William G. Eckhardt, JAGC, Lieutenant Colonel Arthur L. Hunt, JAGC, Captain Rita R. Carroll, JAGC, and Captain Thomas J. Feeney, JAGC.

Captain Samuel J. Rob, JAGC, argued the cause for the appellee. With him on the brief were Colonel James Kucera, JAGC, and Lieutenant Colonel Thomas M. Curtis, JACC.

Before PAULEY, NAUGHTON, and WALCZAK, Appellate Military Judges

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MEMORANDUM OPINION

Per Curiam:

Appellant was tried on 10 August 1983 by a general court-martial composed of officer and enlisted members[1] and con-

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[1] The court members selected by General Anderson to sit in appellant's case were members of nondivisional units within his geographic jurisdiction.

vened by Major General Thurman E. Anderson, Commander, 3d Armored Division.[2] In accordance with his pleas, appellant was convicted of indecent, lewd and lascivious acts (two specifications) and carnal knowledge, in violation of Articles 134 and 120, Uniform Code of Military Justice, 10 U.S.C. §§ 934 and 920 (1982) (UCMJ). The convening authority approved appellant's sentence to a dishonorable discharge, confinement at hard labor for five years, forfeiture of all pay and allowances and reduction to the grade of Private E-1.

In *United States v. Treakle*, 18 M.J. 646 (ACMR 1984) (en banc), this Court determined that unlawful command influence was present within the general court-martial jurisdiction of the 3d Armored Division during the time General Anderson was in command. *See also United States v. Hill*, 18 M.J. 757 (ACMR 1984); *United States v. Yslava*, 18 M.J. 670 (ACMR 1984) (en banc), *pet. granted*, 19 M.J. 281 (CMA 1985). The unlawful influence consisted of statements by General Anderson which were understood by many servicemembers within the general court-martial jurisdiction of the 3d Armored Division to discourage favorable character testimony. *See United States v. Thompson*, 19 M.J. 690 (ACMR 1984).

Appellant was tried after General Anderson had addressed many members within his general court-martial jurisdiction concerning his policies regarding the administration of military justice. In addition, Lieutenant Colonel Nickens, a member of appellant's court-martial preemptorily challenged by appellant's trial defense counsel, had previously sat as a member in *United States v. Treakle, supra*. This fact is significant since appellant has submitted, as an appellate exhibit, an affidavit from another individual who was a court member in Treakle's trial. This individual avers that General Anderson's perceived policies were discussed during each closed door discussion in which he participated as a court member. Under these facts there exists the appearance that

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[2] Appellant was a member of a nondivisional unit now under General Anderson's command but within his general court-martial jurisdiction. *See* United States v. Treakle, 18 M.J. 646, 649, n.2 (ACMR) (en banc), *pet. pending*, 18 M.J. 443 (CMA 1984).

the court members detailed to this case were subjected to unlawful command influence. We presume that as a result appellant was prejudiced. *See United States v. Treakle*, 18 M.J. at 658. Because the government has not rebutted this presumption, neither the findings of guilty nor the sentence may be affirmed.[3]

This Court's determination that the government has failed to show the court members were not unlawfully influenced to the prejudice of appellant renders unnecessary an examination of whether appellant's trial was otherwise affected by unlawful command influence. We note, however, that prior opinions of this Court have held that an accused tried within the general court-martial jurisdiction of the 3d Armored Division during General Anderson's tenure as commander shall receive the benefit of a rebuttable presumption that he was deprived of favorable character witnesses. *See, e.g., United States v. Abelon*, 19 M.J. 767 (ACMR 1984); *United States v. Thompson, supra*. This Court also has held that the affidavits of Lieutenant Colonel Mueller and Colonel Bozeman, admitted as appellate exhibits in this case,[4] raise questions regarding General Anderson's ability to review and act on cases. *United States v. Thompson*, 19 M.J. at 694. Should the government successfully rebut the presumption that the court members who participated in appellant's trial were influenced to his prejudice, these remaining issues must be resolved before the findings and sentence may be affirmed. The facts necessary to resolve these issues are best ascertained during the course of an adversary proceeding. *See United States v. Dubay*, 37 CMR 411 (CMA 1967).

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[3] The facts of record indicate the presence of unlawful command influence may not have affected the appellant's pleas of guilty. *See* United States v. Treakle, 18 M.J. at 657-58; United States v. Yslava, 18 M.J. at 672. We do not finally resolve this issue since, as we discuss *infra*, an issue has been raised concerning the convening authority's action in this case.

[4] See United States v. Glidewell, 19 M.J. 797 (ACMR 1985), and United States v. Thompson, *supra*, for a discussion concerning the contents of these affidavits.

The record of trial is returned to The Judge Advocate General for such action as is required to conduct a limited hearing ordered by a different convening authority. At the hearing the military judge will receive all available evidence bearing on the following issues:

1. Whether the court members had heard General Anderson's message before appellant's trial and, if so, what they understood the General's policies to be.

2. Whether these policies were discussed by the court members during deliberations or at any time during appellant's trial, to include the time they were gathered in the deliberation room with Lieutenant Colonel Nickens prior to assembly of appellant's court-martial.

3. Whether any court member was actually influenced, to the prejudice of appellant, by General Anderson's statements.

The military judge will hear the respective contentions of the parties, permit the presentation of witnesses and evidence, issue orders and rulings as are appropriate, and enter findings of fact and conclusions of law with respect to the three issues listed above. In addition to the preceding questions, the military judge shall address any additional questions or issues that may arise during this hearing and that he determines are material or relevant to the overall issue of unlawful command influence.

If the military judge determines that the proceedings by which appellant was originally tried were influenced by unlawful command influence, he will return the record to the convening authority who will set aside the findings and sentence and either dismiss the charges or order a rehearing.

If the military judge determines that unlawful command influence did not affect appellant's trial but that General Anderson was not qualified to review and act on appellant's case, he will return the record to the convening authority who will set aside the action by General Anderson and take a new initial action. If the military judge determines that General Anderson was qualified to review and act on the appellant's

case, he will return the record to the convening authority, who will review those findings and take appropriate action under the provisions of Article 64, UCMJ.

In the event the convening authority to whom this case is referred deems a limited hearing on the issues of unlawful command influence and General Anderson's qualifications to review and act on appellant's case impracticable, he will set aside the findings and sentence and either order a rehearing or dismiss the charges.

FOR THE COURT:

/s/ WILLIAM S. FULTON, JR.
William S. Fulton, Jr.
Clerk of Court

APPENDIX H-2

UNITED STATES ARMY COURT OF MILITARY REVIEW

CM 445012

UNITED STATES, APPELLEE

v.

STAFF SERGEANT LARRY C. DEFIBAUGH., 230-64-5945, UNITED STATES ARMY, APPELLANT

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15 April 1986

For Appellant: Lieutenant Colonel Arthur L. Hunt, JAGC, Major Marion E. Winter, JAGC, Captain Peter D. P. Vint, JAGC (on brief).

For Appellee: Colonel James Kucera, JAGC, Lieutenant Colonel Adrian J. Gravelle, JAGC, Lieutenant Colonel Gary F. Roberson, JAGC, Captain Samuel J. Rob, JAGC (on brief).

Before MARDEN, PAULEY, and De GIULIO, Appellate Military Judges

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DECISION ON FURTHER REVIEW

Per Curiam:

This case is before the Court for further review pursuant to Article 66 of the Uniform Code of Military Justice, 10 U.S.C. § 866 (Supp. I 1983) following completion of a limited evidentiary hearing as previously ordered by the Court, *United States v. Defibaugh*, CM 445012 (ACMR 27 Mar. 1985) (unpub.), and completion of a new review and action.

On consideration of the entire record, we hold the findings of guilty and sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

Senior Judge MARDEN did not participate in the decision of this case.

FOR THE COURT:

/s/ WILLIAM S. FULTON, JR.

William S. Fulton, Jr.
Clerk of Court

APPENDIX H-3

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 55131/AR
CMR Dkt. No. 445012

UNITED STATES, APPELLEE

v.

LARRY C. DEFIBAUGH (230-64-5945), APPELLANT

ORDER

On further consideration of the granted issue (____ M.J. ____) (Daily Journal, September 4, 1986) in light of *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986), we conclude that unlawful command influence within the Third Armored Division did not prejudice appellant at any stage of the judicial process. We base this conclusion on appellant's pleas of guilty; the numerous character witnesses who testified in his behalf during the sentencing stage of the trial; the evidence produced at a limited hearing ordered by the Court of Military Review which showed that General Anderson's policies had no impact on the court members and potential character witnesses; and the new action taken by a different convening authority. We also conclude that the two indecent assault offenses on the same victim (specifications 1 and 2 of Charge I) were so united in time, circumstance, and impulse that they should be consolidated into a single offense. *United States v. Huggins*, 17 M.J. 345 (C.M.A. 1984); *United States v. Rushing*, 11 M.J. 95 (C.M.A.1981). Accordingly, it is by the Court this 10th day of October, 1986,

ORDERED:

That specification 1 of Charge I is amended to include the language of specification 2 of Charge I so that it now reads as follows:

> In that Staff Sergeant Larry C. Defibaugh, US Army Company B, 205th Transportation Battalion, did, at Building 323, Sportsfield Housing Area, Hanua, Federal Republic of Germany, on or about 1530 hours, 21 May 1983, wrongfully commit an indecent, lewd, and lascivious act with Jacqueline Denise Ramey by holding and fondling her breast and having her hold his genitals, while he masturbated to ejaculation.

and is renumbered by dropping the number "1"; and that the decision of the United States Army Court of Military Review as to the specification of Charge I as amended; Charge II and its specification, and the sentence is affirmed.

FOR THE COURT:*

/s/ JOHN A. CUTTS, III

John A. Cutts, III
Deputy Clerk of the Court

*Judge Sullivan did not participate.

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (CARRIER)
Appellate Government Counsel (WAMSTED)

APPENDIX I

United States v. McCallum

Private First Class John C. McCallum was referred to a general court-martial on August 30, 1983. He was tried before a court-martial composed of officer members on 8 and 9 November 1983, and was convicted of aggravated assault contrary to his pleas. The adjudged sentence included a bad-conduct discharge, confinement for six months, forfeiture of all pay and allowances and reduction to the rank of Private E-1. The findings of guilty and sentence were approved by MG Anderson on January 25, 1984.

The action of the MG Anderson was set aside by the Army Court of Military Review, based on MG Anderson's lack of ability to impartially review and take action on the case, in an unpublished opinion, CM 445291 (A.C.M.R. 13 Mar. 1985) (Appendix I-1). On June 28, 1985, a different convening authority approved the findings and sentence. The Army court, on further review, affirmed the findings and sentence on September 9, 1985 (Appendix I-2). Subsequently, the Court of Military Appeals held that the new review and action adequately remedied the prejudice suffered by petitioner in an order dated September 24, 1986 (Appendix I-3).

APPENDIX I-1

UNITED STATES ARMY COURT OF
MILITARY REVIEW

CM 445291

UNITED STATES, APPELLEE

v.

PRIVATE FIRST CLASS JOHN C. MCCALLUM, 228-06-4153
UNITED STATES ARMY, APPELLANT

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13 MAR 1985

Lieutenant Colonel Arthur L. Hunt, JAGC, Captain Thomas J. Feeney, JAGC, and Captain Peter D. P. Vint, JAGC, were on the pleadings for appellant.

Colonel James Kucera, JAGC, Lieutenant Colonel Thomas M. Curtis, JAGC, and Captain Samuel J. Rob, JAGC, were on the pleadings for appellee.

Before MARDEN, PAULEY, AND WERNER, Appellate Military Judges

MEMORANDUM OPINION

PAULEY, Judge:

Contrary to his pleas, appellant was found guilty by a general court-martial composed of members of aggravated assault in violation of Article 128, Uniform Code of Military Justice (UCMJ). The convening authority approved appellant's sentence to a bad-conduct discharge, confinement at hard labor for six months, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade.

The appellant, complaining of unlawful command influence, contends that he was denied "his right to trial in a fair forum" as a result of the actions of Major General Thurman E. Anderson, Commanding General, 3d Armored Division, and the convening authority.

In *United States v. Treakle*, 18 M.J. 646 (ACMR 1984), this Court considered *en banc* the issue of unlawful command influence in the 3d Armored Division and determined that Article 37, UCMJ, had been violated. For the reasons stated in *Treakle*, we must find that General Anderson is not disqualified to act as the convening authority in the referral process of the appellant's case. However, we do not need to determine, as we did in *Treakle*, whether Private McCallum might have been deprived of favorable character evidence by this unlawful command influence.

Two character witnesses appeared on appellant's behalf before findings. The appellant's squad leader and his supervisor at his place of work, both noncommissioned officers, testified as to his reputation for peacefulness and truthfulness. We are convinced that the appellant was not deprived of favorable character evidence as concerns his trial on the merits of the case. However, there were no witnesses appearing for the appellant during the sentencing portion of his trial. In fact, the trial defense counsel presented absolutely nothing during extenuation and mitigation proceedings. The record of trial suggests this may have been a tactical decision on the part of defense counsel; however, we need not speculate as to that matter. We are convinced that because character witnesses appeared on the merits, it is obvious that their absence during sentencing proceedings was caused by something other than unlawful command influence. Accordingly, we will affirm the sentence in this case.

Finally, we find that the conflicting affidavits of Lieutenant Colonel Mueller and Colonel Bozeman raise questions concerning General Anderson's ability to impartially review and act on this case. *See United States v. Thompson*, 19 M.J. 690 (ACMR 1984. In the interest of judicial economy, we will order a new review and action.

The action of the convening authority, dated 25 January 1984, is set aside. The record of trial is returned to The Judge Advocate General for a new review and action by a different convening authority.

Judge WERNER concurs.

Senior Judge MARDEN did not participate in the decision of this case.

FOR THE COURT:

/s/ WILLIAM S. FULTON, JR.

William S. Fulton, Jr.
Clerk of Court

APPENDIX I-2

UNITED STATES ARMY COURT OF MILITARY REVIEW

CM 445291

UNITED STATES, APPELLEE

v.

PRIVATE FIRST CLASS JOHN C. MCCALLUM, 228-06-4153, UNITED STATES ARMY, APPELLANT

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9 SEP 1985

For Appellant: Lieutenant Colonel Arthur L. Hunt, JAGC, Major Marion E. Winter, JAGC, Captain Peter D. P. Vint, JAGC (on brief).

For Appellee: Lieutenant Colonel Adrian J. Gravelle, JAGC.

Before MARDEN, PAULEY, and De GIULIO, Appellate Military Judges

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DECISION ON FURTHER REVIEW

Per Curiam:

This case is before the Court for further review pursuant to Article 66 of the Uniform Code of Military Justice, 10 U.S.C. § 866 (Supp. I 1983) following completion of a new review and action as previously ordered by the Court. *United States v. McCallum*, CM 445291 (ACMR 13 Mar. 1985) (unpub.).

On consideration of the entire record, we hold the findings of guilty and sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

Senior Judge MARDEN did not participate in the decision of this case.

FOR THE COURT:

/s/ WILLIAM G. STOKES

William G. Stokes
Captain, JAGC
Acting Clerk of Court

APPENDIX I-3

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 53611/AR
CMR Dkt. No. 445291

UNITED STATES, APPELLEE

v.

JOHN C. MCCALLUM (228-06-4153), APPELLANT

ORDER

On further consideration of the granted issue (22 M.J. 106) in light of *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986), we conclude that unlawful command influence within the Third Armored Division did not affect appellant's contested trial before a court with members or the post-trial proceedings in this case. We base this conclusion on the statements by the members during voir dire that they were either not aware of the remarks by General Anderson and members of his staff or would not be influenced by them; the fact that character witnesses testified in his behalf at the findings stage of the trial and were apparently available to testify during sentencing; and that a new review and action were ordered by the Court of Military Review. Accordingly, it is by the Court this 24th day of September, 1986,

ORDERED:

That the decision of the United States Army Court of Military Review is affirmed.

FOR THE COURT:

/s/ JOHN A. CUTTS, III

John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (VINT)
Appellate Government Counsel (ROBERSON)

APPENDIX J

United States v. Holmes

Private First Class Mark A. Holmes was referred to a general court-martial on May 25, 1983. On June 17, 1983, petitioner was tried before a military judge alone. Pursuant to his pleas, he was found guilty of negligent homicide, and two drug-related offenses. He was sentenced to a dishonorable discharge, confinement for 15 years, total forfeitures, and reduction to the grade of Private E-1. Pursuant to a pretrial agreement, MG Anderson approved the sentence but suspended, for three years, that portion adjudging confinement in excess of three years.

On September 26, 1984, the Army Court of Military Review affirmed the findings but ordered a sentence rehearing holding that unlawful command influence prejudiced petitioner (Appendix J-1). At the sentence rehearing held on November 16, 1984, petitioner was sentenced by the military judge to a dishonorable discharge, confinement for 30 months, and total forfeitures. Pursuant to an "Agreement to Stipulate" to the testimony of defense witnesses, the convening authority reduced the period of confinement to 24 months but otherwise approved the sentence. On June 28, 1985, the Army court affirmed the findings and sentence (Appendix J-2). On September 23, 1986, the Court of Military Appeals affirmed the decision of the Army court (Appendix J-3).

APPENDIX J-1

UNITED STATES ARMY COURT OF
MILITARY REVIEW

CM 444690

UNITED STATES, APPELLEE

v.

PRIVATE FIRST CLASS MARK A. HOLMES,
SSN 156-58-8511,
UNITED STATES ARMY, APPELLANT

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26 September 1984

Lieutenant Colonel Paul J. Luedtke, JAGC, Captain L. Sue Hayn, JAGC, and Captain David L. Carrier, JAGC, were on the pleadings for appellant.

Colonel James Kucera, JAGC, Lieutenant Colonel Thomas M. Curtis, JAGC, Captain Thomas J. Benjamin, JAGC, and Captain Jan M. Wamsted, JAGC, were on the pleadings for appellee.

Before McKAY, WATKINS and LYMBURNER, Appellate Military Judges

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MEMORANDUM OPINION

McKAY, Senior Judge:

Pursuant to his pleas, the appellant was convicted by a military judge sitting as a general court-martial of negligent homicide, distribution of heroin, and possession of heroin and marijuana in the hashish form. He was sentenced to a dishonorable discharge, confinement at hard labor for 15 years, forfeiture of all pay and allowances, and reduction to the lowest enlisted grade. The convening authority approved

the sentence, but, as required by the terms of a pretrial agreement, suspended for three years the confinement adjudged in excess of three years. Before this Court, the appellant asserts that, because of his injudicious conduct, the convening authority, Major General Thurman E. Anderson, was disqualified as convening authority, that the appellant, by virtue of General Anderson's exertion of unlawful command influence, was denied a fair sentencing proceeding, and that General Anderson was disqualified from taking action in the appellant's case.

Although there was evidence of the existence of unlawful command influence within the 3d Armored Division, *see United States v. Treakle*, 18 M.J. 646 (ACMR 1984) (en banc), we are satisfied that, under the facts of this case, the appellant suffered no prejudice as to findings. *See United States v. Yslava*, 18 M.J. 670 (ACMR 1984) (en banc). Before entering findings, the military judge conducted a searching inquiry into the appellant's guilty pleas, and we are satisfied that the appellant's decision to plead guilty was a knowing, intelligent, and conscious act and that the pleas were properly accepted by the military judge. The initiation of a highly favorable, under the circumstances, pretrial agreement also reflects the voluntary nature of the appellant's pleas. We are also satisfied that General Anderson did not possess an inelastic attitude such as would disqualify him from taking action in the appellant's case.

During the sentencing portion of the appellant's trial, however, no witnesses appeared on behalf of Private Holmes. The record contains no explanation or indication of why no testimony was presented. Because pervasive command influence has been shown to have existed in the 3d Armored Division and the record of trial does not explain the absence of witnesses, we must presume that favorable witnesses were influenced to the prejudice of the appellant. *United States v. Schroeder*, SPCM 18935 (ACMR 24 Aug. 1984). A rehearing on sentence will therefore be ordered.

We have considered the remaining assignment of error raised by the appellant and find it to be without merit.

The findings of guilty are affirmed. The sentence is set aside. A rehearing on sentence may be ordered by a different convening authority.

Judge LYMBURNER concurs.

Judge WATKINS did not participate in this decision.

FOR THE COURT:

/s/ WILLIAM S. FULTON, JR.

William S. Fulton, Jr.
Clerk of Court

APPENDIX J-2

UNITED STATES ARMY COURT OF
MILITARY REVIEW

CM 444690

UNITED STATES, APPELLEE

v.

PRIVATE FIRST CLASS MARK A. HOLMES, 156-58-8511
UNITED STATES ARMY, APPELLANT

---

28 June 1985

Lieutenant Colonel Arthur L. Hunt, JAGC, Major Stephen R. Dooley, JAGC, and Captain David L. Carrier, JAGC, were on the pleadings for appellant.

Colonel James Kucera, JAGC, Lieutenant Colonel Adrian J. Gravelle, JAGC, Captain Samuel J. Rob, JAGC, and Captain Jan M. Wamsted, JAGC, were on the pleadings for appellee.

Before McKAY, WATKINS, and LYMBURNER, Appellate Military Judges

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MEMORANDUM OPINION ON FURTHER REVIEW

McKAY, Senior Judge:

This case is before the Court for mandatory review pursuant to Article 66, Uniform Code of Military Justice, following the completion of a rehearing on the sentence which was earlier ordered by the Court. *United States v. Holmes*, CM 444690 (ACMR 26 Sep. 1984) (unpub.). Holmes was tried by a general court-martial in the 3d Armored Division convened by Major General Thurman E. Anderson; on review, this Court affirmed the findings of guilty to negligent

homicide, distribution of heroin, and possession with the intent to distribution heroin and marijuana. However, the Court set aside the sentence and authorized a rehearing on the sentence based upon its holding in *United States v. Schroeder*, 18 M.J. 792 (ACMR 1984), *pet. granted*, 19 M.J. 314 (1985).

At the sentence rehearing Holmes made no motions and called no witnesses. He advised the military judge that he had submitted an "Agreement to Stipulate" to the convening authority in which he agreed to stipulate to the expected testimony of certain defense witnesses in extenuation and mitigation in return for the convening authority's agreement to specified sentence limitations. He assured the military judge he was satisfied with the agreement and that there were no witnesses he wanted produced at the sentence rehearing.

Before this Court the appellant now contends that the actions of Major General Anderson pervaded the appellant's case and impacted on every stage of the proceedings and that the findings of guilty should be reversed without a finding of particularized prejudiced. We disagree. This issue was decided against the appellant when the Court originally affirmed the findings. There is nothing in the record warranting a change to that decision. A rehearing on the sentence was provided to the appellant for the effects of General Anderson's conduct upon his trial and no further relief is required.

The action of the Court on the findings, dated 26 September 1984, is reaffirmed and remains in effect. The sentence approved by the convening authority on 28 December 1984 is affirmed.

Judge LYMBURNER concurs.

Judge WATKINS did not participate in this decision.

FOR THE COURT:

/s/ ABRAHAM NEMROW

Abraham Nemrow
Acting Clerk of Court

APPENDIX J-3

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 53266/AR
CMR Dkt. No. 444690

UNITED STATES, APPELLEE

v.

MARK A. HOLMES (156-58-8511), APPELLANT

ORDER

On further consideration of the granted issue (21 M.J. 412) in light of *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986), we conclude that command influence within the Third Armored Division did not prejudice appellant at any stage of the judicial process. We base this conclusion on appellant's pleas of guilty and the sentence rehearing conducted pursuant to the order of the Court of Military Review. Accordingly, it is by the Court this 23rd day of September, 1986,

ORDERED:

That the decision of the United States Army Court of Military Review is affirmed.

FOR THE COURT:

/s/ JOHN A. CUTTS, III

John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (CARRIER)
Appellate Government Counsel (WAMSTED)

APPENDIX K

United States v. Schlote

Private First Class Jeffery W. Schlote was referred to a general court-martial on November 11, 1983. He was tried by military judge alone on November 16, 1983, and was convicted in accordance with his pleas of several drug-related offenses. His adjudged sentence included a bad-conduct discharge, confinement for one year, forfeiture of all pay and allowances, and reduction to the rank of Private E-1. Pursuant to a pretrial agreement, MG Anderson, on February 18, 1984, suspended so much of the confinement in excess of seven months for one year.

The Army Court of Military Review affirmed the findings and sentence on September 12, 1984 (Appendix K-1). However, the Army court reconsidered its decision on January 11, 1985, and decided that the issue of MG Anderson's ability to take action on the case was sufficiently raised and ordered a new review and action (Appendix K-2). A different convening authority approved the findings and sentence.

On January 17, 1986, the Army court consolidated three specifications and affirmed the findings and sentence (Appendix K-3). Subsequently, in an order dated September 24, 1986, the Court of Military Appeals held that the Army court's action adequately remedied any prejudice suffered by petitioner (Appendix K-4).

APPENDIX K-1

UNITED STATES ARMY COURT OF
MILITARY REVIEW

CM 445387

UNITED STATES, APPELLEE

v.

PRIVATE FIRST CLASS JEFFERY W. SCHLOTE,
SSN 498-72-5943,
UNITED STATES ARMY, APPELLANT

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12 SEP 1984

Major Robert M. Ott, JAGC, Captain L. Sue Hayn, JAGC, and Captain David W. Sorensen, JAGC, were on the pleadings for appellant.

Colonel James Kucera, JAGC, Lieutenant Colonel Thomas M. Curtis, JAGC, Captain Samuel J. Rob, JAGC, and Captain Paul E. Jordan, JAGC, were on the pleadings for appellee.

Before MARDEN, PAULEY, and WERNER, Appellate Military Judges

MEMORANDUM OPINION

PAULEY, Judge:

In accordance with his pleas, the appellant was convicted by a military judge, sitting as a general court-martial, of wrongful possession of hashish with intent to distribute, distribution of hashish, and use of hashish, lysergic acid diethylamide (LSD), and cocaine, in violation of Article 134, Uniform Code of Military Justice. The sentence included a

bad-conduct discharge, one year of confinement at hard labor, total forfeitures, and reduction to Private E-1. Pursuant to a pretrial agreement, the convening authority approved the sentence but suspended for one year that portion of confinement in excess of seven months, with provision for automatic remission.

The appellant generally alleges that Major General (MG) Anderson, the Commanding General of the 3d Armored Division, was disqualified to take the review and action in his case; that the appellant was denied a fair sentencing proceeding; that MG Anderson was disqualified to act in the referral of his case; and that unlawful command influence interfered with his right to a trial by members. The appellant also set forth two allegations of error involving issues of multiplicity.

In *United States v. Treakle*, 18 M.J. 646 (ACMR 1984), this Court considered *en banc* the issue of command influence in the 3d Armored Division and determined that Article 37, Uniform Code of Military Justice, had been violated. For the reasons stated in *Treakle*, we must find that General Anderson is not disqualified to act as the convening authority. However, we do need to determine whether the appellant might have been deprived of favorable character evidence as was the case in *Treakle*.

As a result of an investigation at his place of duty, Private Schlote became known as a distributor of marijuana. During a period of several months, he sold marijuana to numerous soldiers. He waived an investigation under Article 32, Uniform Code of Military Justice, and, facing charges which could have resulted in punishment that might lawfully include a dishonorable discharge and confinement at hard labor for twenty-seven years, entered into a pretrial agreement with the convening authority, wherein MG Anderson agreed to suspend all confinement in excess of seven months. The appellant requested, in writing, to be tried before military judge alone and after the requisite discussion with the military judge persevered with that request. The proceedings in extenuation and mitigation included testimony by the appellant's immediate supervisor for the preceding ten

months prior to a reassignment and appellant's current immediate supervisor. Both witnesses testified in a very favorable manner for the appellant. There is nothing in the record to indicate that the accused might have been deprived of favorable character evidence.

We are satisfied that the unlawful command influence that existed within the 3d Armored Division did not adversely affect the appellant's trial. *See United States v. Yslava*, 18 M.J. 670 (ACMR 1984) (*en banc*). It is clear that the appellant predicated the forum for his trial and his election to plead guilty upon matters other than an issue of command influence. We find no merit to the contentions of the appellant concerning the findings of guilty. We also find no error with respect to the review and action by the convening authority. *Id.*

We agree with appellant that errors of multiplicity occurred in Specifications 1, 2 and 3 of the Charge. *United States v. Zubko*, 18 M.J. 387 (CMA 1984); *United States v. Bullington*, 18 M.J. 164 (CMA 1984). We will cure those errors by consolidation. The findings of guilty of Specifications 1, 2 and 3 of the Charge are consolidated by inserting in line 3 of Specification 2 of the Charge after the word "wrongfully" the following words, "possess, use, and." The finding of guilty of Specification 2 of the Charge, as amended, is affirmed. The findings of guilty of Specifications 1 and 3 of the Charge are set aside and those specifications are dismissed. The remaining findings of guilty are affirmed. Reassessing the sentence on the basis of the errors noted and the entire record, the Court affirms the sentence.

Judge WERNER concurs.

Senior Judge MARDEN did not participate in this decision.

FOR THE COURT:

/s/ WILLIAM S. FULTON, JR.

William S. Fulton, Jr.
Clerk of Court

APPENDIX K-2

UNITED STATES ARMY COURT OF
MILITARY REVIEW

CM 445387

UNITED STATES, APPELLEE

v.

PRIVATE FIRST CLASS JEFFERY W. SCHLOTE, 498-72-5943,
UNITED STATES ARMY, APPELLANT

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11 JAN 1985

Lieutenant Colonel William P. Heaston, JAGC, Major Robert M. Ott, JAGC, Captain L. Sue Hayn, JAGC, Captain Michael D. Graham, JAGC, and Captain David W. Sorensen, JAGC, were on the pleadings for appellant.

Colonel James Kucera, JAGC, Lieutenant Colonel Thomas M. Curtis, JAGC, Captain Samuel J. Rob, JAGC, Captain Paul E. Jordan, JAGC, and Captain Thomas J. Benjamin, JAGC, were on the pleadings for appellee.

Before MARDEN, PAULEY, and WERNER, Appellate Military Judges

MEMORANDUM OPINION ON RECONSIDERATION

Per Curiam:

This case is before the Court for reconsideration of its decision of 12 September 1984.

Upon reconsideration we hold that the question of whether the convening authority, Major General Thurman E. Anderson, should be disqualified from reviewing and acting on this case, has been raised by the affidavits of Lieutenant Colonel

Mueller and Colonel Bozeman and that the conflicting allegations therein should be resolved. One of the ways this may be accomplished is through a limited rehearing before a military judge appointed by a different convening authority. *See United States v. Thompson*, ____ M.J. ____ (ACMR 16 Nov. 1984). We believe that, in the instant case, the same equitable results can be achieved with greater judicial economy by ordering a new review and action by a different convening authority.

The decision of this Court in this case, dated 12 September 1984, is withdrawn. The action of the convening authority, dated 18 February 1984, is set aside. The record of trial is returned to The Judge Advocate General for a new review and action by a different convening authority.

Senior Judge MARDEN did not participate in the decision of this case.

FOR THE COURT:

/s/ WILLIAM S. FULTON, JR.
William S. Fulton, Jr.
Clerk of Court

APPENDIX K-3

UNITED STATES ARMY COURT OF MILITARY REVIEW

CM 445387

UNITED STATES, APPELLEE

v.

PRIVATE FIRST CLASS JEFFERY W. SCHLOTE, 498-72-5943, UNITED STATES ARMY, APPELLANT

---

17 JAN 1986

For Appellant: Lieutenant Colonel William P. Heaston, JAGC, Lieutenant Colonel Paul J. Luedtke, JAGC, Major Robert M. Ott, JAGC, Major Eric T. Franzen, JAGC, Captain L. Sue Hayn, JAGC, Captain Michael D. Graham, JAGC, Captain David W. Sorensen, JAGC (on brief).

For Appellee: Colonel James Kucera, JAGC, Lieutenant Colonel Thomas M. Curtis, JAGC, Lieutenant Colonel Adrian J. Gravelle, JAGC, Lieutenant Colonel Larry D. Williams, JAGC, Captain Samuel J. Rob, JAGC, Captain Paul E. Jordan, JAGC, and Captain Thomas J. Benjamin, JAGC, Captain Kathy J. M. Peluso, JAGC (on brief).

Before MARDEN, PAULEY, and De GIULIO, Appellate Military Judges

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MEMORANDUM OPINION ON FURTHER REVIEW

Per Curiam:

This case is before the Court for further review pursuant to Article 66 of the Uniform Code of Military Justice, 10 U.S.C. § 866 (Supp. I 1983), following completion of a new review and action as previously ordered by the Court. *United States*

v. Schlote, CM 445387 (ACMR 11 Jan. 1985) (unpub.). On the Court's own motion, we will admit and consider all previous pleadings filed in this case by both the government and the appellant.

We find that errors of multiplicity occurred in Specifications 1, 2, and 3 of the Charge. *United States v. Zupancic*, 18 M.J. 387 (CMA 1984); *United States v. Bullington*, 18 M.J. 164 (CMA 1984). We will cure those errors by consolidation.

The remaining assignments of error are without merit.

Specifications 1, 2, and 3 of the Charge are consolidated by inserting in line 3 of Specification 2 of the Charge after the word "wrongfully" the following words, "possess, use, and". The findings of guilty of Specification 2 of the Charge, as amended, are affirmed. The findings of guilty of Specifications 1 and 3 of the Charge are set aside and those specification are dismissed. The remaining findings of guilty are affirmed. Reassessing the sentence on the basis of the errors noted and the entire record, the Court affirms the sentence.

Senior Judge MARDEN took no part in the decision of this case.

FOR THE COURT:

/s/ WILLIAM S. FULTON, JR.

William S. Fulton, Jr.
Clerk of Court

APPENDIX K-4

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 54567/AR
CMR Dkt. No. 445387

UNITED STATES, APPELLEE

v.

JEFFERY W. SCHLOTE (498-72-5943), APPELLANT

ORDER

On further consideration of the granted issue (22 M.J. 337) in light of *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986), we conclude that unlawful command influence within the Third Armored Division did not prejudice appellant at any stage of the judicial process. We base this conclusion on appellant's pleas of guilty and trial before a military judge alone; the fact that character witnesses testified in his behalf at the sentencing stage of the trial; and that a new review and action were ordered by the Court of Military Review. Accordingly, it is by the Court this 24th day of September, 1986,

ORDERED:

That the decision of the United States Army Court of Military Review is affirmed.

FOR THE COURT:

/s/ JOHN A. CUTTS, III

John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (SORENSEN)
Appellate Government Counsel (JACKSON)

APPENDIX L

United States v. Shepherd

Specialist Four Kevin C. Shepherd's case was referred to a special court-marital empowered to adjudge a bad-conduct discharge on March 14, 1983. He was tried before military judge alone, and in accordance with his pleas, was convicted of distribution of hashish. His adjudged sentence included a bad-conduct discharge, confinement for 90 days, forfeiture of $382.00 pay per month for three months, and reduction to the lowest enlisted grade. On May 26, 1983, MG Anderson approved the sentence but suspended for six months that portion of the confinement in excess of two months.

On February 27, 1985, the Army Court of Military Review ordered a new review and action because the initial review did not adequately address the issue of command influence (Appendix L-1). Subsequently, a different convening authority approved only so much of the sentence as provided for, *inter alia*, a bad-conduct discharge and confinement for 45 days. On further review, the Army court concluded that petitioner was not prejudiced by actual command influence and affirmed the findings and only so much of the sentence as provided for a bad-conduct discharge, forfeiture of $350.00 pay per month for three months, confinement at hard labor for 41 days, and reduction to the lowest enlisted grade, in an unpublished opinion, SPCM 19499 (A.C.M.R. 19 Dec. 1985) (Appendix L-2). The Court of Military Appeals affirmed the Army court's decision in an order dated September 24, 1986 (Appendix L-3).

APPENDIX L-1

UNITED STATES ARMY COURT OF
MILITARY REVIEW

SPCM 19499

UNITED STATES, APPELLEE

v.

SPECIALIST FOUR KEVIN C. SHEPHERD, 261-45-6268,
UNITED STATES ARMY, APPELLANT

---

27 Feb 1985

Major Stephen R. Dooley, JAGC, and Captain Alan D. Groesbeck, JAGC, were on the pleadings for appellant.

Colonel James Kucera, JAGC, Lieutenant Colonel Thomas M. Curtis, JAGC, and Captain Samuel J. Rob, JAGC, were on the pleadings for appellee.

Before SUTER, YAWN, and WALCZAK, Appellate Military Judges

MEMORANDUM OPINION

WALCZAK, Judge:

On 26 March and 24 April 1983, appellant was tried in the 3d Armored Division by a court-martial convened by Major General Thurman E. Anderson. Pursuant to his pleas, appellant was convicted by a military judge sitting as a special court-martial of distribution of marijuana in the hashish form. He was sentenced to a bad-conduct discharge, confinement at hard labor for 90 days, forfeiture of $382.00 pay per month for three months, and reduction to the grade of Private E-1. Pursuant to a pretrial agreement, the convening

authority, General Anderson, approved the sentence but suspended for six months all confinement at hard labor in excess of two months.

Appellant contends, *inter alia*, that General Anderson was disqualified from reviewing and acting on his case because General Anderson attempted to discourage favorable character testimony for accused soldiers during their court-martial.[1] Appellant maintains that such conduct by General Anderson impugns his ability as a convening authority to fairly and impartially review the findings and sentence in appellant's case.

The Court held in *United States v. Thompson*, 19 M.J. 690 (ACMR 1984); and *United States v. Glidewell*, SPCM 19095 (ACMR 15 Jan. 1985), that an issue has been raised concerning General Anderson's ability to review and act on cases. We cannot resolve this issue on the record before us. While an adversary proceeding would be the proper forum for determining whether General Anderson was qualified to review and act on this case,[2] the nature of the remedy required if he were not qualified, coupled with considerations of judicial economy, convinces us that we should order a new review and action.

The action of the convening authority, dated 26 May 1983, is set aside. The record of trial is returned to The Judge Advocate General for a new review and action by a different convening authority.

Chief Judge SUTER concurs.

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[1] See United States v. Treakle, 18 M.J. 646 (ACMR 1984; United States v. Yslava, 18 M.J. 670 (ACMR 1984); and United States v. Mitchell, SPCM 18953 (ACMR 31 Jan. 1985), for a discussion of the evidence relating to command influence in the 3d Armored Division during the time General Anderson was in command.

[2] *See* United States v. DuBay, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967); United States v. Thomas, 19 M.J. 690 (ACMR 1984).

YAWN, Senior Judge, dissenting:

Under the facts of this case, I would order a limited hearing for the purpose of determining whether appellant's trial was affected by command influence. Since my brothers do not agree, I write separately to emphasize that, by our action, the convening authority must examine anew the findings and sentence in this case. The issue of command influence raised before this Court was not adequately addressed in the initial review. The convening authority, who reviews this case, must determine whether the findings and sentence were affected by unlawful command influence and, if so, take effective remedial action, to include ordering a rehearing if necessary.

FOR THE COURT:

/s/ WILLIAM S. FULTON, JR.
William S. Fulton, Jr.
Clerk of Court

APPENDIX L-2

UNITED STATES ARMY COURT OF MILITARY REVIEW

SPCM 19499

UNITED STATES, APPELLEE

v.

SPECIALIST FOUR KEVIN C. SHEPHERD, 261-45-6268, UNITED STATES ARMY, APPELLANT

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19 December 1985

For Appellant: Major Stephen R. Dooley, JAGC, Captain Pamela G. Montgomery, JAGC (on brief).

For Appellee: Lieutenant Colonel Adrian J. Gravelle, JAGC.

Before YAWN, WILLIAMS, and KENNETT, Appellate Military Judges

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MEMORANDUM OPINION ON FURTHER REVIEW

Per Curiam:

This case is before the court for mandatory review pursuant to Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866 (1982 & Supp. I 1983), following completion of a new review and action ordered by the court. *United States v. Shepherd*, SPCM 19499 (ACMR 27 Feb. 1985) (unpub.). Appellant was tried in the 3d Armored Division by a special court-martial convened by Major General (MG) Thurman E. Anderson. Pursuant to his pleas, appellant was convicted of wrongful distribution of some amount of marijuana (hashish),

and was sentenced by the military judge to, *inter alia*, a bad-conduct discharge and confinement for 90 days. Major General Anderson approved the sentence, but, pursuant to the pretrial agreement, suspended the confinement in excess of two months.[1]

On further review, appellant renews the contention that MG Anderson's conduct over an extended period of time pervaded and illegally affected every stage of the proceedings.[2] Appellant requests we set aside the findings and sentence and authorize a rehearing. We decline to do so.

Appellant's assertion that MG Anderson was disqualified from referring the case to trial has already been decided against appellant by *United States v. Treakle*, 18 M.J. 646, 654-55 (ACMR 1984) (en banc), *pet. granted*, 20 M.J. 131 (CMA 1985). *See United States v. Yslava*, 18 M.J. 670, 672 (ACMR 1984), *pet. granted*, 19 M.J. 281 (CMA 1985). With respect to the effect MG Anderson's actions may have had on the sentencing proceedings, the resolution of that issue is controlled by this court's decision in *United States v. Cruz*, 20 M.J. 873 (ACMR 1985) (en banc). *See United States v. Whitaker*, CM 445267 (ACMR 8 Nov. 1985); *United States v. Breininger*, 20 M.J. 1006 (ACMR 1985).

Appellant made no motion at trial for dismissal or any other relief based upon the alleged unlawful command influence by MG Anderson. On appeal, however, in an attempt to support his argument that the sentencing proceedings were affected by MG Anderson's activities, appellant has presented us with the evidence which this court considered in its decisions in *United States v. Treakle* and *United States v. Yslava*. We have also considered additional circumstantial evidence in the form of affidavits from Colonel John R.

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[1] The new action by the Acting Commander, U.S. Army Correctional Activity, Fort Riley, Kansas, approved only so much of the sentence as provided for, *inter alia*, a bad-conduct discharge and confinement for 45 days.

[3] *See* United States v. Treakle, 18 M.J. 646 (ACMR 1984) (en banc), *pet. granted*, 20 M.J. 131 (CMA 1985), and United States v. Yslava, 18 M.J. 670 (ACMR 1984), *pet. granted*, 19 M.J. 281 (CMA 1985), for a detailed discussion of the evidence relating to command influence in the 3d Armored Division during the time MG Anderson was in command.

Bozeman, Lieutenant Colonel Mark A. Mueller, and Major Michael A. Buchanan, which was not available at the time of the *Treakle* and *Yslava* decisions,[3] as well as the testimony of Sergeant First Class Larry J. Parks at the 18 December 1984 sentence rehearing in *United States v. Smith*, CM 444370.[4]

When an appellant alleges for the first time at the appellate level that unlawful command influence affected his trial, he must show more than a *possibility* that his trial was adversely affected by such influence to shift to the government the burden of persuading this court to the contrary. *United States v. Cruz*, 20 M.J. at 886. He must present evidence which would lead a reasonable person to conclude, under the totality of circumstances, that unlawful command influence affected his case. *Id.* The appellant has failed to sustain this burden. Sifting through the avalanche of affidavits filed in this case and others before this court, we find none from any members of appellant's company or battalion. Thus, other than his general allegation that his sentencing proceedings were affected, appellant has offered no evidence that he was deprived of any witnesses. Moreover, appellant has failed to show that the individuals whose testimony he claims to have been denied had even heard of MG Anderson's comments.

Appellant presented extensive character evidence at trial. In a stipulation of expected testimony, his former direct supervisor, a staff sergeant, said appellant's duty performance was "very high," and appellant would be "a further asset to the Army." Another supervisor, a master sergeant, testified appellant's duty performance was "fine," appellant

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[3] *See* United States v. Scott, 20 M.J. 1012, 1014 (ACMR 1985), for a discussion of this evidence. Although the Buchanan affidavit has not been filed in this case, we take judicial notice thereof, as it was filed in *United States v. Scott, supra*. *See* United States v. Surry, 6 M.J. 800, 802 n.4 (ACMR 1978), *pet. denied*, 7 M.J. 62 (CMA 1979).

[4] *See* United States v. Whitaker, CM 445267 (ACMR 8 Nov. 1985), slip. op. at 7 n.2 (Yawn, S.J., concurring in part and dissenting in part) for a discussion of this testimony. We have taken judicial notice of this testimony as it was not filed as a separate defense appellate exhibit in the instant case.

was punctual and presented a fine appearance, and, "all in all," appellant "got the mission accomplished." The noncommissioned officer-in-charge of appellant's duty section, another master sergeant, testified appellant performed in an acceptable and satisfactory manner as an acting sergeant, was conscientious and punctual, and presented a good appearance. Finally, a letter from a family friend stated appellant was honest, industrious, and had integrity. Considering the quality of evidence presented on appellant's behalf, we are convinced that appellant was not prejudiced by any efforts, real or perceived, by MG Anderson to discourage favorable testimony. Moreover, we find the evidence presented to this court insufficient to raise a justiciable issue that actual unlawful command influence affected the sentencing proceedings in appellant's case as it only supports the general allegation that it was merely possible that his case was affected. Something more than a mere allegation of wrongdoing must be shown. For example, statements from members of appellant's chain of from members of appellant's chain of [sic] command or from other prospective witnesses who would have testified on his behalf might be sufficient to require the government to show there was no actual harm to appellant.[5] In this regard, we note the following remarks by appellant's trial defense counsel, before the sentence was announced and after the military judge queried whether appellant had been prejudiced by the Command Sergeant Major Haga letter:[6]

> No, Your Honor, of course not. It's obvious from the rank of the witnesses that they were not affected or if they were affected they disregarded it and testified on behalf of the accused.

Additionally, prior to announcing the sentence, the military judge stated his belief that the Haga letter had created "no perceptible prejudice to the accused. . ."

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[5] If appellant has anything further to offer, he is free to petition this court for permission to submit it in connection with a request for reconsideration. *See* CMR Rule of Practice and Procedure 19.

[6] *See* United States v. Treakle, 18 M.J. at 651, for a discussion of this letter, which appears as an appellate exhibit in the instant case.

As to any effect that MG Anderson's actions may have had on appellant's plea decision, our examination of the evidence of record convinces us that the validity of appellant's plea of guilty remains unaffected. As noted above, appellant has not yet raised the issue of a prejudicial denial of witnesses; this being the only means through which the validity of his plea could have been affected, it follows that we have no cause for concern on that score. Moreover, the record of trial reflects a potentially strong government case, a favorable plea bargain, and a searching inquiry by the military judge into appellant's plea of guilty. We are satisfied that appellant's plea of guilty was a knowing, intelligent, and voluntary act which was properly accepted by the military judge. *See United States v. Care*, 18 C.M.A. 535, 40 C.M.R. 247 (1969).

Our determination that appellant's claim of actual unlawful command influence merits no relief does not end our responsibility, however, as we must also consider whether the appearance of unlawful command influence exists. "It is axiomatic that the best way to dispel the appearance of evil is to publish the truth about the situation." *United States v. Cruz*, 20 M.J. at 890. "[T]he appearance of unlawful command influence will normally become relevant only in the absence of actual unlawful command influence because the process of publicly determining whether the appellant has been prejudiced by actual unlawful command influence, and remedying it if he has, will normally remove the appearance of unlawful command influence as well." *Id.* at 891. In the case at bar, the information already in the trial record, supplemented by the great mass of evidence furnished by the parties at the appellate level, and this court's judicial analysis of the circumstances, satisfies us that reasonable members of the public will conclude that no appearance of unlawful command influence affected the sentencing proceedings. Moreover, we believe that the result of our inquiry, which led us to conclude that appellant was not prejudiced by actual unlawful command influence, will likewise erase any public perception that the appearance of unlawful command influence affected appellant's trial.

Although not raised by appellant, we note the 45 days' confinement approved in the new action by the Acting Commander, U.S. Army Correctional Activity, exceeds the 41 days' confinement recommended for approval by the Acting Staff Judge Advocate. No explanation for this variance appears in the allied papers of the record of trial, as suggested by para. 85*c*, Manual for Courts-Martial, United States, 1969. We will affirm only so much of the approved confinement as provides for confinement for 41 days, and, out of an abundance of caution, afford appellant some relief with respect to the approved forfeiture of pay.

We have considered the issues specified by appellant in his request for appellate representation and find them to be without merit.

The findings of guilty are affirmed. Only so much of the sentence as provides for a bad-conduct discharge, forfeiture of $350.00 pay per month for three months, confinement at hard labor for 41 days, and reduction to the grade of Private E-1 is affirmed.

YAWN, Senior Judge, dissenting.

In my initial dissent in this case, *United States v. Shepherd*, SPCM 19499 (ACMR 27 Feb. 1985) (unpub.), I stated that I would order a limited hearing to determine whether unlawful command influence affected appellant's trial. Since that opinion was written, new evidence has been admitted by this court showing more clearly the pervasive effect General Anderson's actions had upon the military justice system in the 3d Armored Division. On the basis of this new evidence and for the reasons stated in my original dissent, I find that General Anderson's actions in the 3d Armored Division were such that I am unable to say with any degree of conviction that appellant's court-martial was free of unlawful command influence. In my view, sufficient evidence has been presented to shift the burden of persuasion in this regard to the government, and they have not met this burden. See my separate opinion in *United States v. Whitaker*, CM 445267, slip op. at 5-8 (ACMR 8 Nov. 1985) (Yawn, S.J., concurring in part and dissenting in part). Unlike the majority, I do not believe the

testimony at trial is sufficient to sustain the government's burden. Moreover, the new review and action accomplished in this case were insufficient to resolve the issue. Accordingly, I would set aside the findings and sentence and authorize a rehearing.

FOR THE COURT:

/s/ WILLIAM S. FULTON, JR.
William S. Fulton, Jr.
Clerk of Court

APPENDIX L-3

UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 54555/AR
CMR Dkt. No. 19499

UNITED STATES, APPELLEE

v.

KEVIN C. SHEPHERD (261-45-6268), APPELLANT

ORDER

On further consideration of the granted issue (22 M.J. 357) in light of *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986), we conclude that unlawful command influence within the Third Armored Division did not prejudice appellant at any stage of the judicial process. We base this conclusion on appellant's pleas of guilty and trial before a military judge alone; the fact that character witnesses testified in his behalf at the sentencing stage of the trial; and that a new review and action were ordered by the Court of Military Review. Accordingly, it is by the Court this 24th day of September, 1986.

ORDERED:

That the decision of the United States Army Court of Military Review is affirmed.

FOR THE COURT:

/s/ JOHN A. CUTTS, III

John A. Cutts, III
Deputy Clerk of the Court

cc: The Judge Advocate General of the Army
Appellate Defense Counsel (MONTGOMERY)
Appellate Government Counsel (ROB)

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